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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,)	No. P1300CR20081339
)	
Plaintiff,)	Div. 6
)	
vs.)	MOTION TO DISMISS OR IN
)	THE ALTERNATIVE MOTION
STEVEN CARROLL DEMOCKER,)	TO DISMISS THE DEATH
)	PENALTY (as a sanction for
Defendant.)	prosecutorial misconduct)
)	
)	
)	(Oral Argument Requested)

Steven DeMocker, by and through counsel, is compelled by the unprecedented events of the last several weeks to file this Motion to Dismiss (or in the alternative to Dismiss the Death Penalty) as a sanction for prosecutorial misconduct. This Motion is in response to the prosecution's meritless effort on April 2, 2010, to remove the Judge assigned to this case and, in so doing, to trample on Mr. DeMocker's constitutional

1 rights to a fair trial before an unfettered and independent tribunal. The State's actions
2 were a blatant attempt to intimidate the judge. We fully expect the Court to deny that
3 the demand that he recuse himself and the subsequent motion to remove him for cause
4 will influence his decision-making. This is always the way it is with intimidation.
5 Neither the defendant nor the public can ever know whether and to what extent the
6 attempt to intimidate has achieved its goal. This Court and the public can evaluate the
7 prosecution's action and can see it for what it is—a clumsy, arrogant and ethically
8 inappropriate attempt at judicial intimidation.
9

10 MEMORANDUM OF POINTS AND AUTHORITIES

11 On Friday morning, April 2, 2010, the prosecution filed a motion to remove this
12 Court, the Honorable Thomas B. Lindberg, from continuing to preside over this case on
13 the stated ground that Judge Lindberg had revealed himself to be unable to perform his
14 judicial function in a "fair and impartial" manner. The prosecution did so after first
15 urging the Judge to recuse himself on an oral motion made in chambers. Judge
16 Lindberg inquired of the prosecution what conduct caused them to believe that he was
17 "biased" and no longer capable of performing his judicial function in this case. The
18 prosecutors answered that their recusal request was based on a comment they alleged
19 that the Judge made during an off-the-record discussion with all counsel four days
20 earlier (on March 30, 2010). The prosecutors claimed that the Judge informed all
21 present on that date that he "did not believe" that the prosecution would ever get to the
22 mitigation phase of this case. Judge Lindberg responded that he must have been
23 misheard or misunderstood and that he was sure he did not make that statement. He
24 then asked others who had been in attendance in Chambers on March 30 what they
25 recalled. The only person to express the view that the Judge had made this statement
26 was the second prosecutor. All defense counsel either did not hear the statement or
27
28

1 remembered instead an inoffensive and correct observation by the court that certain
2 issues would only need to be addressed "if" the case were to get to that phase.

3 After hearing the basis stated on the record by the prosecution, and after hearing
4 the memories of others in attendance, Judge Lindberg declined to recuse himself. The
5 prosecution then immediately advised Judge Lindberg that it had anticipated his
6 response, and so it had. Indeed, the prosecution had already drafted and was prepared to
7 file a motion under Rule 10.1 for his removal for cause. Copies of the motion and a
8 sworn affidavit from Mr. Joseph Butner were presented immediately to the Court, and a
9 copy was given to Mr. DeMocker's attorneys. The Court, as it is required to do under
10 Rule 10 of the Rules of Criminal Procedure, suspended the hearings scheduled to begin
11 that morning and confirmed that it would take no other action in the case pending
12 consideration of the prosecution's motion. (The transcript of the hearing before Judge
13 Lindberg is attached as Exhibit A.)

14 As is also required by Rule 10, Judge Lindberg informed Yavapai County
15 Superior Court Presiding Judge Robert M. Brutinel of this matter. This motion to
16 disqualify was promptly heard in that court. In the ensuing hearing, the prosecution
17 called as its first witness Ms. Anne Chapman, one of Mr. DeMocker's attorneys, to
18 recount what she had heard Judge Lindberg say in Chambers on March 30. She
19 confirmed what she had said several minutes earlier in the proceeding in Judge
20 Lindberg's Court, i.e., that she did not hear a statement by Judge Lindberg pre-judging
21 the case or revealing any bias. (The transcript of the proceeding before Presiding Judge
22 Brutinel is attached as Exhibit B; Ms. Chapman's testimony is at pages 15-31.)¹

23
24 ¹ At first blush, one might wonder why the prosecution would call Ms. Chapman as a witness, since she had only
25 minutes earlier told the Court and all counsel that she did not share the prosecution's version of the March 30
26 colloquy. The answer is that the prosecution had already executed a sworn affidavit in which it had asserted that it
27 had "verified" the statement with Ms. Chapman. This it had not done. It certainly might have been attempted if
the prosecution had chosen to do so. Mr. Butner had both Ms. Chapman's office and cell phone numbers and had
called her frequently on other matters in the last few days. We suspect there is an obvious reason why the State
elected not to try to confirm its account of the March 30 conversation.

1 Apparently undeterred by the failure of Ms. Chapman to confirm the prosecutor's claim,
2 and also apparently uninterested in the similarity between what she remembered and
3 what Judge Lindberg had described as his memory only a few minutes earlier, the
4 prosecution then called Judge Lindberg to the stand. *Id.* at 30.

5 The Judge, no longer wearing his black robe, was sworn in and took the witness
6 stand. So unprecedented was this event that the Judge was uncertain whether he should
7 be called "judge" or "Mr." *Id.*

8 In what can only be described as the most awkward of role reversals, the
9 prosecution grilled the Judge about the in-chambers conversation that had occurred four
10 days earlier. As we are sure the prosecution anticipated, Judge Lindberg re-confirmed
11 what he had explained only minutes before when he was the assigned Judge and not a
12 sworn witness. He had not said what the prosecution alleged he said, and had not said
13 anything else that might reveal bias.

14 As it had apparently planned all along, the prosecution quickly shifted its focus
15 to a new topic. The questions now turned to a new line of attack, focusing on a matter
16 not mentioned in the immediately preceding in-chambers recusal proceeding. The
17 prosecution now sternly questioned Judge Lindberg about an on-the-record inquiry he
18 had made more than two months earlier. This shift in focus, we submit, deserves
19 careful attention. This is the colloquy in question:

21 THE COURT: You are not the only decision maker when it comes to
22 seeking the death penalty. My understanding is that those decisions are made by
23 more than one person in your office. It's made by the assigned prosecutor in
conjunction, though, with the county attorney and possibly other senior attorneys
in the office.

24 MR. BUTNER: That is entirely correct.

25 THE COURT: Is it the position now that we are so much longer down the
26 road and in the case that there has been or is going to be any review of the
request for the death penalty in this case?

1 MR. BUTNER: That is a good question. Judge. From my point of view
2 professionally that's an ongoing process. I hesitate at this point to speak for
3 anybody else besides myself.

4

5 THE COURT: . . . My question to Mr. Butner with regard to whether the
6 death penalty is still something that will be sought in this particular case and his
7 response, I think, are pertinent.

8 I totally agree it's an ongoing process and I hope that it's an ongoing
9 process. It must need to be an ongoing process. I think it's an ethical, moral,
10 and legal imperative to keep brief reviewing at all stages of the proceeding
11 whether or not the most significant penalty in the law is appropriate.

12

13 So with that preliminary commentary I hope that the State continues to
14 review its decision with regard to whether the death penalty is appropriate for
15 this particular case. . . .

16 (Tr. of Proceedings, January 13, 2010, at 158-66.)

17 Several preliminary and telling clarifications are necessary. First, the colloquy in
18 question did not occur, as the prosecution suggested, on March 2., 2010. In fact, the
19 colloquy occurred more than six weeks earlier, on January 13, 2010. It is some measure
20 of their haste and indifference to accuracy that the prosecutors provided an incorrect
21 date. Apparently, they guessed – and guessed wrong – about the date of so important a
22 hearing. Second, this on-the-record exchange was omitted entirely from the
23 prosecutor's stated basis for asking Judge Lindberg to recuse himself. If Judge
24 Lindberg had agreed to recuse himself, the written motion would never have been filed
25 or argued, and the real reason for the County Attorney's actions might not have been
26 disclosed. Indeed, it had never been mentioned by the prosecutor as a source of any
27 concern at any time over the last two and one-half months, but it became eminently
28 clear that this was the real reason for filing the motion to remove Judge Lindberg for
cause.²

² By waiting two and one-half months, of course, the prosecution ran afoul of the 10-day notice requirement in Rule 10 and had therefore waived this ground. In an effort to step around this gaping hole, the State endeavored to argue that it was not really until Judge Lindberg's remarks of March 30 that the "bias" revealed by the January 13

1 There may be at least one other reason why the prosecution had chosen not to
2 mention the January 13 proceeding. Mr. Paupore almost certainly was not even present
3 at the time. Mr. Butner advised the Court on January 29th that Mr. Paupore would be
4 helping him on the case Mr. Paupore made his first appearance on February 19 and was
5 certainly present on March 2 – the date mistakenly identified by the prosecutors as the
6 date of Judge Lindberg’s comment. Yet, in his sworn testimony Mr. Paupore testified,
7 “I did hear the Judge address Mr. Butner in the fashion such as you described.” (Exhibit
8 B at 61). Mr. Paupore went on to describe in some detail what he remembered hearing
9 that afternoon (*Id.* at 61-62). It is conceivable that Mr. Paupore was lurking somewhere
10 in the back of the courtroom on that January day, but if he was, he can be joined with
11 Mr. Butner as among the prosecutors who saw nothing wrong or troubling about the
12 Judge’s comments that day. Now, months later, the prosecution cites this colloquy as
13 proof that Judge Lindberg is “biased,” that he lacks the ability to be a “fair and impartial
14 judge on this case,” and that he might have exhibited “undue favoritism in favor of the
15 defendant, or undue antagonism against the State.” (Exhibit B, at 35.) Now, the
16 prosecution argues that what Judge Lindberg really meant to convey to the State on
17 January 13 was that he “doesn’t believe that the State should have filed the death
18 penalty allegation in this case.” (*Id.* at 78.) In its closing argument before Judge
19 Brutinel, the prosecutor again asserted—despite whatever Judge Lindberg testified to as
20 his state of mind—that the State no longer believed the Judge was capable of being “fair
21 and impartial.” (*Id.* at 83.)

22 After hearing the three witnesses, including Judge Lindberg, Judge Brutinel ruled
23 from the Bench without hesitation that he “doesn’t find anything improper” in the
24 Court’s January 13th inquiry. (*Id.* at 84.) One must then also ask, if it is clear that there

25
26 statements became clear. The bias must have been very well hidden indeed, since on January 13 the prosecution
27 not only seemed to overlook the impropriety of the Court’s comments, it appeared to agree with the Court entirely
28 at that time.

1 was nothing improper about Judge Lindberg's inquiry into whether the prosecution was
2 continuing to assess the propriety of seeking death, why was it raised now by the
3 prosecutor a month before trial? Judicial intimidation, we submit, was the sole purpose.
4 Intimidation with respect to the single most important issue permeating this case—the
5 death penalty—was on their minds.

6 These prosecutors are public officials. They are not just advocates seeking
7 convictions; they are public ministers with a responsibility to see that justice is done.
8 Possibly the most important duty a public prosecutor has is his duty to decide whether
9 to charge a defendant with a death penalty-eligible crime. When a prosecutor launches
10 a proceeding that carries with it the consequence that the person accused could be
11 executed, it is essential that the function be undertaken with proper and due care. Many
12 would argue that this is the highest function of the Executive Branch. Judge Lindberg
13 spoke a truth beyond challenge when he said on January 13 that the County Attorney
14 had "an ethical, moral, and legal imperative to keep reviewing at all stages of the
15 proceeding whether or not the most significant penalty in the law is appropriate." (Tr.
16 of Proceedings January 13, 2010 at 166).

17 The Court, acting on behalf of the Judicial Branch, also has an important and
18 ongoing duty to assure that all parties are approaching death penalty litigation with the
19 most proper intent. Certainly, as has happened in this case, a judge must strike
20 aggravating factors alleged by the State when they prove to be unsupported by probable
21 cause or to be otherwise legally insufficient. Certainly, as has also happened in this
22 case, a judge has the prerogative to strike the death penalty or particular aggravating
23 factors as a sanction for continued and unexplained failures by the prosecution to
24 comply with its disclosure obligations. The judicial function, however, goes beyond
25 these actions and includes the duty at every stage to make sure that the parties are aware
26 of and considering the consequences of capital litigation.

These judicial responsibilities attend every capital case, but they become especially important in cases like this one where the defendant asserts actual innocence and that innocence is supported by unresolved evidence arising from our increased knowledge of DNA. With 252 DNA exonerations in this country, it can no longer be questioned that innocent people have been tried, convicted and in some cases sentenced to death based upon evidence that was later determined to be incorrect – determined by the same kind of DNA evidence that excludes this Defendant but remains unresolved in this case.

It cannot be proper for the prosecution to attempt to intimidate the Judge in his fulfillment of this responsibility of his office. Steven DeMocker has a constitutional right to have his case tried before an impartial and disinterested tribunal. *Villapando v. Reagan*, 211 Ariz. 305, 121 P.2d 172 (2006). The Arizona Code of Judicial Conduct articulates well this central point:

An independent, fair, and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial and competent judiciary composed of men and women of integrity, will interpret and apply the law that governs our society.

Preamble to the Arizona Code.

One of the ways that our system attempts to assure that we will have an independent judiciary is to have strong ethical norms governing the conduct of lawyers. High on the ethical duty list is Ethical Rule 3.5 which provides that “lawyers shall not seek to influence a judge, juror, prospective juror or other official of a tribunal by means prohibited by law.” We submit that the filing of this motion to disqualify Judge Lindberg “for cause” on virtually the eve of trial is nothing short of an ethically inappropriate attempt to “influence” this Judge.

When a prosecutor files a motion to disqualify a judge, and does so entirely without basis, one must question the underlying motive. There can be no doubt about the baselessness of this prosecutorial motion. Indeed, the real motive became apparent

1 during the hearing on April 2 when the prosecutor shifted his focus from the off-the-
2 record comment on March 30 to the extended on-the-record exchange on January 13.
3 Some time between January 13 and April 2 the prosecution decided that it did not
4 approve of the Judge's inquiry into whether the prosecution was continuing to evaluate
5 the propriety of the death penalty in this case. Maybe this was just the proverbial shot
6 across the bow. Maybe this was nothing more than a bully's reminder that the Judge
7 ought not to question the prosecutor's performance of his duties.

8 Possibly the most troubling aspect of the prosecutors' effort of April 2 was its
9 timing. As Mr. Paupore acknowledged during his testimony in Judge Brutinel's court,
10 the County Attorney was fresh from losing several motions—notably motions to
11 preclude significant portions of the testimony the prosecutors hoped to elicit from
12 Barbara O'non. (See Exhibit B, at 68-69.) As Mr. Paupore admitted on cross-
13 examination, it was only after the State had received these negative rulings that he and
14 Mr. Butner had a conversation about whether Judge Lindberg could "be fair and
15 impartial." *Id.* at 69. Mr. Paupore also acknowledged another reason for the disturbing
16 timing of its emergency motion. Scheduled for that morning were a

17 multitude of motions ... and some of it is very material and important evidence
18 to the State's case. With the significance of what is at stake on these numerous
19 pending motions, my concern about that comment [by the Judge] was can he be
20 fair and impartial in deciding on these multitude of evidentiary issues that is
21 facing – that he will be facing, if he proceeds as the Judge" (*Id.* at 67-68.)

22 The County Attorney filed this Rule 10 motion when it did in an effort to send a
23 message to Judge Lindberg before he entertained argument and ruled on motions of
24 importance to the State. They did so in a manner calculated to publicly embarrass the
25 Judge. The prosecutors surely knew that by insisting on an unprecedented and elaborate
26 emergency proceeding in the courtroom of the Presiding Judge, they would be
27 generating a news story that would appear at the top of the front page of the *Prescott*
28

1 *Courier*. And, of course, it did—just as the first of the prospective jurors were being
2 summoned to fill out questionnaires. See Exhibit C attached.

3 For this reason, it is particularly unsettling that this basis was not revealed during
4 the proceedings in Judge Lindberg's chambers on April 2 when the State asked the
5 Judge to recuse himself. If judicial inquiry into the prosecutorial death penalty function
6 was indeed deemed improper, why was that ground not raised by the prosecution before
7 they made it a public spectacle? We suspect it was not raised because the prosecution
8 knew that if they asked about that inquiry, the Judge would explain – as he did later on
9 the witness stand – exactly why he felt it appropriate to make such an inquiry. The
10 prosecution wanted to have the opportunity to ask the question not in an in-chambers
11 conversation but in open court so that it might better send its message of embarrassment
12 and intimidation.

13 **REQUEST FOR SANCTIONS**

14 The question now arises whether there is to be any remedy for this prosecutorial
15 misconduct. We submit that the Court must respond and respond firmly both to assure
16 that justice is done and to assure that there is no longer a stain of the appearance of
17 impropriety. See Code of Judicial Conduct, Rule 1.2. The appropriate remedy must be
18 considered in the context of the lengthy history in this case of the County Attorney's
19 disregard for this Court's orders. The unexplained and repeated failures by the County
20 Attorney to comply with its disclosure obligations has now resulted in the striking of
21 two of the three remaining aggravating circumstances. Earlier in the case, the failure of
22 the County Attorney to make a fair presentation to the Grand Jury resulted in a
23 dismissal and remand. At the end of the day, however, none of these abuses have
24 deterred the prosecution in any material way. Steven DeMocker still faces the death
25 penalty and the County Attorney continues to feel free to engage in efforts to intimidate
26 the Court.

1 Steven DeMocker must now face the fear that the County Attorney's efforts may
2 succeed. Steven DeMocker must be concerned that the County Attorney will have so
3 intimidated the Court that it will step aside and give the prosecutor the free reign it
4 wants. There is no sanction among those usually considered that could be properly
5 invoked here. This Defendant would be constitutionally disserved if he were to be
6 given a different judge. He would be disserved if the Court tried at this late date to
7 impose a continuance. He would be disserved by any modest monetary sanction that
8 might be imposed on the County Attorney. The only sanctions that might assure justice
9 would be either a dismissal of this case in its entirety or a dismissal of the remaining
10 single aggravator, eliminating the possibility that a death sentence might be obtained in
11 a case now tainted by the prosecutor's improper pressure.

12 The Court must weigh the impact of the prosecutors' conduct on Steve
13 DeMocker's right to a fair trial by an untainted jury. The timing and the manner in
14 which the State chose to proceed, as noted above, guaranteed front page news in the
15 only local newspaper. This was the second above-the-fold story generated by the
16 prosecution since jury selection began. The first occurred when the prosecutor's army
17 of subordinates fanned out across the Hassyampa Golf Course on the first day of the
18 jury selection process. As a result, the public and the jury pool in Yavapai County have
19 been subjected to volley after volley of adverse publicity. See Exhibit D.

20 The courtroom prosecutors might well claim that the decision to seek the
21 removal of Judge Lindberg was a decision made by their "superiors." That is certainly
22 how Mr. Butner chose to explain to the Court his reversal of the decision to share expert
23 witness charges. (See Exhibit E; Transcript of Proceedings on April 7 at 3,6). Of
24 course, it makes no difference whether the decision here was made by the courtroom
25 prosecutors or by their superiors. The County Attorney's Office – as an Office – has the
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27
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1 duty to supervise and the duty to see that all ethical and professional norms are
2 followed. Arizona Rules of Professional Responsibility, ER 5.1.

3 We can never know whether and to what extent the State's baseless attack has
4 succeeded. As we have observed, we would expect Judge Lindberg to say that he has
5 not been affected by the unsuccessful motion and by the statements repeatedly made in
6 open court by the prosecutors during the hearing before Judge Brutinel. One can never
7 know for sure whether behavior designed to intimidate has achieved its goal or whether
8 the victim of intimidation is going forward in much the same way he would have
9 without an attack on his reputation. It may be for this reason that Rule 10.2 was
10 amended several years ago to require that lawyers who wish to exercise a change of
11 judge are now required to make an avowal that the request "is made in good faith and
12 not ... to obtain advantage or avoid disadvantage in connection with a plea bargain or at
13 sentencing." Rule 10.2(b)(7). This "avowal" is required of an attorney in his capacity
14 "as an officer of the court." *Id.* No such avowal, of course, is required by rule "for
15 cause" challenges apart from the requirement of an affidavit.

16 Arizona's Rules of Criminal Procedure are designed to encourage judges to
17 participate actively in the conversations and negotiations that may lead to an appropriate
18 resolution of any criminal case. Eg. Rule 17.4. Since there was absolutely nothing
19 inappropriate about Judge Lindberg's January 13 inquiry, and since at least at that time
20 the prosecutor seemed to agree that standards of professionalism required his office to
21 continue to evaluate the death penalty charge, there can be no explanation for the abrupt
22 and inappropriate decision to attack the Court. For these reasons, we ask that the Court
23 in the interests of justice, and in order to secure the rights of Steve DeMocker to a trial
24 that conforms to the basic notions of fairness and due process, and to deter future
25 behavior like what we have all seen here now, either to dismiss this prosecution or to
26 dismiss the remaining single aggravator.

We add this postscript to address two questions raised by the Court at the conclusion of our most recent day of hearings, April 13, when we advised the Court of our plan, if necessary, to file this motion. The Court asked whether the motion should be heard by this Court or by another judge. We believe that in the first instance this motion should be considered by this Court. While it is based on recent actions of the prosecutor, it is filed against the backdrop of orders and the conduct of the State throughout this case, including the now lengthy history of death penalty-related arguments and orders. Any other judge or tribunal would need considerable background information fully to evaluate this motion.

Judge Brutinel's comment that he did not see the County Attorney's conduct as being in bad faith, underscores our concern. Judge Brutinel was entirely unaware of what had just happened in Judge Lindberg's chambers and was of course unaware that the central premise of the Rule 10 motion was based on a misrepresentation of the record from what we now know as the January 13 proceeding. He also could not begin to appreciate the long history of this case, including the important details of the jury selection process then occurring across the hall from his Courtroom.

The Court also asked why this Motion should not be rejected as untimely under the 20-day deadline of Rule 16.1. As we tried to explain without going into detail, as of April 13, we were still awaiting the last results from the last round of untimely but extensive DNA examinations. As we knew would be the case, those results have now been received and they fully support both the absence of biological evidence that might implicate Mr. DeMocker and the continued presence of a full male DNA profile from under the victim's fingernails—a male nowhere present in any of the more than 50 male buccal swabs obtained by the prosecution. We had harbored some residual hope that these results might persuade the County Attorney to reconsider its prosecutorial decision—and especially its decision to seek death. For some of the same reasons that

1 the Court inquired whether the State was assessing its death penalty decision, the
2 defense had urged the State to do so as well. Although we have been given no written
3 response, and no explanation of reasons, we have been told that the State will not
4 voluntarily reconsider its decision. We submit that the defense had some obligation to
5 afford the State an opportunity to reconsider in light of the recent DNA results and the
6 dismissal of aggravating factors imposed by this Court as a sanction. We submit that
7 this is good cause for the defense's deferral of filing this motion for several days.

8 DATED this 19th day of April, 2010.

9
10 By: 

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13 Prescott, Arizona 86302

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19 Attorneys for Defendant

20 **ORIGINAL** of the foregoing hand delivered for
21 filing this 19th day of April, 2010, with:

22 Jeanne Hicks
23 Clerk of the Court
24 Yavapai County Superior Court
25 120 S. Cortez
26 Prescott, AZ 86303
27
28

1 **COPIES** of the foregoing hand delivered this
2 this 19th day of April, 2010, to:

3 The Hon. Thomas B. Lindberg
4 Judge of the Superior Court
5 Division Six
6 120 S. Cortez
7 Prescott, AZ 86303

8 Joseph C. Butner, Esq.
9 Yavapai Courthouse Box

10 3061200

1 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
2 IN AND FOR THE COUNTY OF YAVAPAI
3

4 THE STATE OF ARIZONA,)
5 Plaintiff,)
6 vs.) No. CR 2008-1339
7 STEVEN CARROLL DEMOCKER,)
8 Defendant.)
9 _____)

10
11 BEFORE: THE HONORABLE THOMAS B. LINDBERG
12 JUDGE OF THE SUPERIOR COURT
13 DIVISION SIX
YAVAPAI COUNTY, ARIZONA

14 PRESCOTT, ARIZONA
15 FRIDAY, APRIL 2, 2010
9:01 A.M.

16 REPORTER'S TRANSCRIPT OF PROCEEDINGS
17 IN CHAMBERS HEARING
18 RULE 10.1 HEARING HELD IN DIVISION TWO
19 BEFORE THE HONORABLE ROBERT M. BRUTINEL
20 TESTIMONY OF ANNE CHAPMAN, THOMAS B. LINDBERG,
21 AND JEFFREY PAUPORE
22
23

24 ROXANNE E. TARN, CR
25 Certified Court Reporter
Certificate No. 50808

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4 TESTIMONY

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MARCH 2, 2010
9:07 A.M.

IN CHAMBERS HEARING

APPEARANCES:

FOR THE STATE: MR. JOE BUTNER AND MR. JEFF
PAUPORE. INVESTIGATOR SACHEZ.
FOR THE DEFENDANT: MR. JOHN SEARS, MR. LARRY
HAMMOND AND MS. ANNE CHAPMAN. INVESTIGATOR ROBERTSON.

(whereupon, the following was held in chambers.)

THE COURT: Record can show this is a meeting
in chambers. Defendant is not present but all three defense
counsel are, their investigator. And Mr. Butner for the

12 State. Mr. Paupore for the State. Mr. Sechez.

13 MR. BUTNER: Judge, I am the one that asked
14 for this meeting. And I feel really uncomfortable about
15 this, but let me just explain. The last time that we were in
16 chambers when we were talking about the 404(b) evidence, as
17 part of the trial in this matter and as part of the State's
18 case in chief.

19 THE COURT: You are referring primarily to
20 Miss O'non or to something different than that?

21 MR. BUTNER: Just all of it. It was before we
22 started the hearing. We were talking about it, and then we
23 moved from the subject of the 404(b) evidence to the penalty
24 phase of the trial, if you will recall that, and I was
25 basically saying that, you know, certain items of evidence

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1 that the defense had brought up, like the HGH, and multiple⁴
2 affairs and that kind of thing, and the FINRA documents.
3 They were concerned that the State might be wanting to use
4 those things in the case in chief, and I indicated at that
5 point in time, you know, that I was not going to do that,
6 that that wasn't where we were going, but that we did want to
7 be using that evidence in the penalty phase, if we got there.

8 THE COURT: If you got to that point.

9 MR. BUTNER: And you made the comment "I don't
10 believe we are going to get there." And this was after, you
11 know --

12 THE COURT: I don't think I said that. I
13 think I said, I am not sure we are going to get to that.

14 MR. BUTNER: Well, I confirmed the comment
15 with Ms. Chapman, and Mr. Paupore who heard it just exactly
16 like that.

DeMocker-040210AM.txt
THE COURT: I will hear from them.

MR. BUTNER: And, of course, you know, you have already found probable cause to support three death penalty aggravators in this case. And when I heard that comment, I was really, really concerned that you have, at least to some extent, made up your mind in this case, that you have pre-judged the case to some extent, that you are no longer impartial and that you have some bias. And, you know, this is a very, very serious case. We have all worked

extremely hard on the case. But that comment indicated to me that I don't think that the State will be able to receive a fair and impartial trial in this case.

And so the reason that I asked for this meeting in chambers was to ask you to recuse yourself as a result of not really being impartial anymore.

THE COURT: All right. Mr. Paupore.

MR. PAUPORE: Yes, sir.

THE COURT: Did you hear a comment that I said we are not going to get to that point?

MR. PAUPORE: What I heard, Judge, I heard you say is you didn't believe we were going to get to the penalty phase. It was just kind of rolled out in a real casual kind of way, but I did hear it that way, sir.

THE COURT: Mr. Sears.

MR. SEARS: I will plead partial deafness. I remember the discussion. Your honor, I don't mean to be flip with this, it is a very serious matter, but I don't have a clear recollection of what you said, if anything, about that.

I think we are talking about the conversation we had off the record; is that right?

MR. BUTNER: That's correct.

23 MR. SEARS: Okay.

24 THE COURT: Miss Chapman.

25 MS. CHAPMAN: What I recall you saying is "if

1 you get to that point," or "I am not sure if we are going to
2 get to that point."

3 THE COURT: Mr. Hammond.

4 MR. HAMMOND: I actually can't claim deafness,
5 but I spoke very briefly to Mr. Butner about this on the
6 telephone. I didn't realize this is why he was asking me.
7 But I don't remember the comment that way. I remembered it
8 as, I guess the word I would use is prefatory, that is I
9 thought the Court was simply observing that if we get there,
10 that is an issue. I didn't regard it as is a pre-judgment.
11 If I had, I probably would have focused on it, but I really
12 didn't. And I don't have a clear memory, so I don't know if
13 you can count on my recollection.

14 THE COURT: Anyone else that was present?

15 Mr. Robertson.

16 MR. ROBERTSON: I was not present.

17 THE COURT: Mr. Sechez?

18 MR. Sechez: I was not present.

19 THE COURT: I don't believe that I said --
20 indicated my belief that we were not going to get to that
21 phase of the proceedings. Whenever you have a jury trial, I
22 recognize that the defendant is presumed by law to be
23 innocent. And I have heard much more in this case than I
24 have in most cases prior to a trial occurring.

25 I don't have any biases against the

1 State's evidence in the case. I am not the one that will

2 judge the case as far as the facts are concerned. The jury
3 is the one that decides the facts of the case. And I think I
4 said, "if we get to that point."

5 I don't believe that there is a reason
6 for me to recuse from the case at this point. So I am going
7 to deny the request to recuse from the case.

8 MR. BUTNER: Judge --

9 THE COURT: If you want to put something more
10 on the record or do something else, please do.

11 MR. BUTNER: We are going to have to, Judge.
12 We are going to file a 10.1 notice for cause on the basis of
13 that comment.

14 THE COURT: All right.

15 MR. BUTNER: I have that stuff to file now.

16 THE COURT: What do you want to do with regard
17 to today's hearings?

18 MR. BUTNER: Well, I don't think -- until we
19 resolve this issue, I don't think we can go forward.

20 THE COURT: I expect you are correct in that
21 regard.

22 MR. SEARS: Can we have a moment to confer,
23 Judge, maybe?

24 THE COURT: You may.

25 MR. HAMMOND: Your Honor, I may need more than

□

1 just a moment. I want to take a look at the rule if I could.⁸
2 I understand, just before we go, that what is being suggested
3 here is that we should suspend all proceedings until there is
4 an opportunity for a hearing on the motion to remove you for
5 cause.

6 Is that what the motion is?

7 THE COURT: I think so.

8 MR. BUTNER: That is basically the motion,
9 sir, and I will give you a copy of it as soon as I file it.
10 Do you want me to give it to you now?
11 MR. HAMMOND: That would help us.
12 THE COURT: I am not sure I have my pocket
13 part in what I just gave you.
14 MR. HAMMOND: I have my little pamphlet.
15 Your Honor, maybe given the seriousness
16 of this, rather than just stepping outside for a moment,
17 maybe we ought to take a couple of minutes and allow us to
18 confer and do a little bit of thinking.
19 THE COURT: I will do that. We have a lot of
20 issues concerned with the case that are going to be sitting
21 unresolved. We have a jury, what is essentially part of the
22 jury voir dire process, going on even as we speak. So I
23 think if that is filed, I am going to have to refer it
24 immediately to Judge Brutinel and see what he wants to do in
25 terms of setting a hearing on this.

□

1 MR. SEARS: If we could have a moment, Judge,⁹
2 and take our leave.
3 THE COURT: Well, you may.
4 MR. BUTNER: Madam Clerk, I believe you are
5 the person I give these to.
6 THE CLERK: Okay.
7 MR. BUTNER: Thank you, very much.
8 (Whereupon, at 9:11 a.m. a recess was taken.)
9 (Whereupon, the following was held in open court.)
10 THE COURT: It is 9:45. We were set this
11 morning at nine o'clock in connection with the variety of
12 motions that were set for this morning. We had a conference

13 on the record in chambers with the lawyers present.

14 The State has subsequently filed a 10.1
15 motion for a change of judge for cause, together with an
16 attached affidavit. The Court's duty, I believe, is to refer
17 the matter to another judge to consider that motion.

18 Mr. Hammond, Mr. Sears, Ms. Chapman are
19 here with the defendant. Mr. Paupore and Mr. Butner here for
20 the State. Do you have any disagreement with my observation
21 about I think I can't do anything on the case unless and
22 until this is decided by a different judge?

23 MR. BUTNER: I agree, Judge.

24 THE COURT: Mr. Hammond?

25 MR. HAMMOND: Your Honor, I have looked at the

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1 rule in the few minutes that we have had this morning, and I¹⁰
2 want to put on the record, first, that we think this motion
3 is filed in bad faith. We think it is filed for
4 inappropriate reasons having to do with the State's position
5 in this case. We think it is nothing short of outrageous.

6 However, we read the rule, I think,
7 almost exactly the same way the Court has read it. Under
8 Rule 10.1, an affidavit having been filed alleging bias and
9 prejudice, the Court is under a duty to communicate, I
10 believe, with the presiding judge, and the presiding --

11 THE COURT: Which I will indicate for the
12 record I have done, solely to indicate that I have a 10.1
13 motion, who should I refer it to?

14 MR. HAMMOND: I believe it is -- and it may
15 not matter materially, but it is the responsibility, I
16 believe, of the presiding judge to make the decision to whom
17 the case is assigned. At least in theory, if you were guilty
18 of bias and prejudice, you shouldn't be, yourself, selecting

19 the judge who passes on this motion, which is why the rule is
20 written in this two-step way.

21 we feel totally hamstrung by this. we
22 think you have to confer with the presiding judge, and the
23 presiding judge, either himself -- believes he could do it
24 himself, or he could appoint another hearing judge. All we
25 would ask, since we have no alternative under the rule, is

1 that this be done as quickly as humanly possible. If it ¹¹
2 could be done in the next five minutes, we would think that
3 appropriate.

4 THE COURT: As I say, I communicated solely
5 with Judge Brutinel the fact that a 10.1 motion has been
6 filed in this case. He has indicated to me that he would be
7 willing and able to hear that immediately, and that would be
8 in his courtroom. However, he needs to use my staff, the
9 bailiff and court reporter and probably the clerk, because
10 the Division Two staff is elsewhere today, I think for some
11 training.

12 Mr. Butner.

13 MR. BUTNER: Judge, I just wanted to note that
14 this is not filed in bad faith. I have never filed a motion
15 like this before in my entire career. It was filed honestly
16 and sincerely and with much trepidation.

17 THE COURT: You don't have any reason to have
18 trepidation from my standpoint. I understand the motivation
19 for it. And it is probably something that should be heard,
20 and should be heard quickly, because we do have the jury
21 selection process going on. And there is nothing to be done
22 with it until Judge Brutinel makes a decision on the motion.

23 So I will stay any further action on the

24 pending motions. I will refer the matter to the presiding
25 judge. I did not advise him in any way, shape or form what

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1 the reason for it was. And if he needs or seeks my
2 testimony, if you all need or seek my testimony, I will be
3 down when called by you or the judge.

4 So I will direct the parties to
5 immediately proceed to Division Two. I think Judge Brutinel
6 is ready for you. The defendant must be there, as well. So
7 I will direct the detention staff to take him. And I will
8 direct my staff to go assist Judge Brutinel with making an
9 appropriate record.

10 Stand in recess.

1 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

2 IN AND FOR THE COUNTY OF YAVAPAI

3
4 THE STATE OF ARIZONA,)

5 Plaintiff,)

6 vs.)

No. CR 2008-1339

7 STEVEN CARROLL DEMOCKER,)

8 Defendant.)
9

10
11 BEFORE: THE HONORABLE THOMAS B. LINDBERG
12 JUDGE OF THE SUPERIOR COURT
13 DIVISION SIX
YAVAPAI COUNTY, ARIZONA

14 PRESCOTT, ARIZONA
15 FRIDAY, APRIL 2, 2010
9:01 A.M.

16 REPORTER'S TRANSCRIPT OF PROCEEDINGS
17 IN CHAMBERS HEARING

18 RULE 10.1 HEARING HELD IN DIVISION TWO
19 BEFORE THE HONORABLE ROBERT M. BRUTINEL

20 TESTIMONY OF ANNE CHAPMAN, THOMAS B. LINDBERG,
21 AND JEFFREY PAUPORE
22
23

24 ROXANNE E. TARN, CR
25 Certified Court Reporter
Certificate No. 50808

1 INDEX

2
3
4 TESTIMONY
5

10 Stand in recess.

11 (Whereupon, the following is a 10.1 hearing held in
12 Division Two in front of the Honorable Robert M. Brutinel.)

13 THE COURT: CR 2008-1339, State versus
14 DeMocker. The record will reflect the presence of the
15 defendant, who is represented through his attorneys,
16 Mr. Hammond and Mr. Sears. The State is present with their
17 attorneys, Mr. Butner and Mr. Paupore.

18 This is the time and date set for a
19 hearing on the State's motion for change of judge for cause.
20 And gentlemen, I note that we have Judge Lindberg's court
21 reporter with us today. Do either of you have an objection
22 to that?

23 Mr. Butner.

24 MR. BUTNER: No, Judge. No objection to that.

25 And I would just like to state again for

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1 the record that this is not for the purposes of delay and
2 this is done in good faith. I have never, ever filed a
3 motion like this before.

4 THE COURT: Noted.

5 Mr. Hammond, any problem with the court
6 reporter?

7 MR. HAMMOND: No, I have no problem with the
8 court reporter, Your Honor, but there are a couple of more
9 people that ought to be identified.

10 For the record, our colleague Anne
11 Chapman from the offices of Osborn and Maledon, who has been
12 involved with the case since the outset is here. And Richard
13 Robertson, our investigator, is also here.

14 Thank you.

15 THE COURT: Thank you, Mr. Hammond.

16 Mr. Butner, I read the motion, I will
17 hear from you.

18 MR. BUTNER: Judge, it pretty clearly states
19 what the reason the State has filed this motion is, and that
20 is because we feel as if we were not going to be able to get
21 a fair and impartial trial from Judge Lindberg now on the
22 basis of a comment that he made in chambers off the record
23 concerning the fact that -- and our recollection, quite
24 frankly, is that when the discussion was taking place
25 concerning Rule 404(b) evidence in the State's case in chief,

□
1 the discussion then went to the penalty phase of the trial,¹⁴
2 and Judge Lindberg stated "I don't believe we will get
3 there." And we believe that that demonstrates that he no
4 longer can be unbiased and impartial in this case. And as a
5 result of that, we don't believe that we will be able to
6 receive a fair trial.

7 THE COURT: What you ask for in the motion is
8 to call Judge Lindberg to testify to determine his

9 impartiality.

10 MR. BUTNER: That's correct, Judge, and there
11 are other witness that we would call, also.

12 THE COURT: Mr. Hammond, do we disagree that
13 the statement was made?

14 MR. HAMMOND: Yes, Your Honor, we do disagree
15 that the statement was made in the way it has been
16 characterized here.

17 We have had a conversation about this in
18 Judge Lindberg's chambers on the record this morning. And
19 each of the people who were at the last conference have
20 described their memories, and the Judge has also given us his
21 memory. We do dispute vigorously the characterization of
22 what the judge said. We think that is not what he said. He
23 simply observed that we aren't at the penalty phase yet, and
24 he said something like "if we get there." He did not express
25 an opinion about the merits of the case or about whether the

1 death penalty would or would not be appropriate.

15

2 As I said in Judge Lindberg's court, Your
3 Honor, we think this motion is filed in bad faith. We think
4 there is absolutely no basis for it. But we understand under
5 the rule that we need to have a hearing. We have no choice
6 about that. And so whatever has to be done in order to
7 satisfy the Court that this judge -- and the standard,
8 obviously, that we are all looking at under 10.1 is whether
9 Judge Lindberg can provide a fair and impartial trial.

10 And if we have to bring Judge Lindberg in
11 and put him under oath in order to establish that to this
12 Court's satisfaction, then so be it. But we have a whole day
13 of motions pending today. We are a month from trial. So
14 whatever we can do to expedite this, we do so without waiving

15 any objections that we may have to the filing of this motion
16 this morning by the prosecutor. But we understand that we
17 need to move forward and get this done.

18 THE COURT: Thank you, Mr. Hammond.

19 Mr. Butner, who do you intend to call?

20 MR. BUTNER: I would call Ms. Chapman to the
21 stand, and Mr. Paupore to the stand, and also Judge Lindberg.

22 THE COURT: You may proceed.

23 MR. BUTNER: Thank you.

24 Ms. Chapman.

25 THE CLERK: You do solemnly swear or affirm

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1 under the penalty of perjury that the testimony you are about¹⁶
2 to give will be the truth, the whole truth, and nothing but
3 the truth, so help you God?

4 THE WITNESS: I do.

5 THE COURT: Mr. Butner.

6 MR. BUTNER: Thank you judge.

7 ANNE CHAPMAN,

8 called as a witness, having been duly sworn, testified as
9 follows:

10 DIRECT EXAMINATION

11 BY MR. BUTNER:

12 Q. Please state your name for the record.

13 A. Anne Chapman.

14 Q. What is your occupation?

15 A. I am an attorney.

16 Q. And are you the attorney for Mr. Steven DeMocker
17 in this case, one of them?

18 A. I am.

19 Q. Were you in chambers in Division Six of the

20 Superior Court on March 30th of the year 2010?

21 A. I was.

22 Q. And present at that time was with you Mr. Sears
23 and Mr. Hammond?

24 A. Along with others, yes.

25 Q. And Mr. Paupore from the County Attorney's office

1 was there, as well as myself; is that correct?

17

2 A. That's correct.

3 Q. And do you recall us engaging in an off-the-record
4 discussion at the request of defense counsel on that day?

5 A. I am not sure who requested the conversation, but
6 I know we engaged in an off-the-record conversation.

7 Q. We were in the judge's chambers; correct?

8 A. Correct.

9 Q. No court reporter present?

10 A. Correct.

11 Q. Do you recall the discussion in chambers turning
12 to the admissibility of evidence under Arizona Rule of
13 Evidence 404(b)?

14 A. I know that was part of the conversation, yes.

15 Q. And do you recall the discussion turning to
16 specific items of evidence, HGH injections, and a FINRA
17 complaint, and other matters that could be characterized as
18 404(b) evidence?

19 MR. HAMMOND: Your Honor, might we approach
20 the bench, please?

21 THE COURT: You may.

22 (Whereupon, the following discussion
23 was held off the record.)

24 MR. HAMMOND: Your Honor, the reason we
25 were in chambers in the first place is that there were
Page 14

18

1 certain matters that are going to be kept out of the
2 trial that are not being made public because we think
3 that would be prejudicial. We have a jury that is in
4 the process of filling out questionnaires right now. We
5 went into chambers for, among other reasons, to talk
6 about the HGH and about other matters that we deemed
7 extraneous, and the prosecutor agreed they were
8 extraneous, and that is what we are talking about now.
9 We are putting it on the record in this proceeding.

10 THE COURT: Mr. Butner.

11 MR. BUTNER: Judge, that is exactly true,
12 but the fact of the matter is that is what the
13 discussion was about.

14 THE COURT: You will not go into matters
15 which the parties have agreed that are extraneous to the
16 trial. There is no reason to prejudice the jury panel.

17 I take it it was not a conversation
18 we're concerned about.

19 MR. BUTNER: I won't go further than I
20 have been.

21 Can I get her to answer the question
22 that I just asked, and the reason is because it is about
23 that evidence?

24 THE COURT: You can ask her for a yes or
25 no to the question just asked.

19

1 MR. BUTNER: Thank you, judge.

2 (Whereupon, the following was held in open court.)

3 THE COURT: Proceed.

4 MR. BUTNER: Thank you

5 Q. I am simply asking for a yes or no answer to that
6 last question in terms of what we were discussing. Do you
7 recall that?

8 A. Yes.

9 Q. Thank you.

10 Then after discussing what type of 404(b)
11 evidence would not be used in the State's case in chief, do
12 you recall us discussing the fact that possibly some of that
13 evidence might be used in the penalty phase of the trial, if
14 we were to get there.

15 A. I recall you discussing that was your intent, yes.

16 Q. And at that point in time, did you hear a judge --
17 hear Judge Lindberg make a comment that he didn't think we
18 were going to get to the penalty phase?

19 A. No.

20 Q. What did you hear Judge Lindberg say, Ms. Chapman?

21 A. That he wasn't sure we were going to get to the
22 penalty phase, or if we get to the penalty phase, we will
23 address those issues at that time.

24 Q. So it was a lengthy comment that you just recited?

25 A. It was one or the other of those comments. I

□ don't recall with specificity what he said.

20

2 Q. Do you recall a telephone conversation where you
3 and Mr. Hammond called me on my cell phone? I think you were
4 driving in a car at the time, on a day following this
5 in-chambers meeting.

6 A. I recall we were driving, and we tried to call you
7 on speaker phone, and Mr. Hammond ended up speaking with you
8 directly. But I was not on the call because the speaker
9 phone did not work.

10 Q. So you couldn't hear what I had to say?

11 A. That's correct.

12 Q. Do you recall Mr. Hammond saying to me that he
13 didn't recall but Miss Chapman did recall?

14 A. I don't recall particularly what Mr. Hammond said.
15 what I recall him saying is "I think Anne heard something
16 like that."

17 MR. BUTNER: Could I have just a moment,
18 Judge?

19 THE COURT: You may.

20 MR. BUTNER: Thank you.

21 Q. So if I am correct in my understanding,
22 Ms. Chapman, you gave two statements. You are not really
23 specific as to what Judge Lindberg said in regard to whether
24 we were going to get to the penalty phase; is that correct?

25 A. I know he didn't say what you asked me if he said.

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1 I know he either said "I am not sure if we are going to get²¹
2 there," or "if we get there, we are going to deal with it
3 then."

4 Q. So your recollection is he said, "I am not sure we
5 are going to get there," or the other version that you recall
6 is, "if we get with there, we will deal with it then"?

7 A. Correct. We were talking about whether or not
8 404(b) evidence was going to be admitted in the penalty
9 phase.

10 MR. BUTNER: Thank you. I don't have any
11 further questions of this witness at this time.

12 THE COURT: Mr. Hammond, you may cross
13 examine.

14 CROSS-EXAMINATION

15 BY MR. HAMMOND:

16 Q. Miss Chapman, let's expand a little bit on the
17 conversation that Mr. Butner just asked you about.

18 We were returning from Prescott to
19 Phoenix the day after hearings with the Court. Is that your
20 memory?

21 A. That's correct.

22 Q. Tell the Court again, so that this can be as clear
23 as we can make it, the context in which the call from Joe
24 Butner occurred.

25 A. After the hearing on Tuesday, we -- Judge Lindberg

□
1 had asked us to address another issue on Friday morning. ²² So
2 we were trying to call Mr. Butner on the drive back to
3 discuss the issue that we were going to address in court on
4 Friday morning. We tried to call him on the speaker phone.
5 The speaker phone did not work. He could not hear us. So
6 you, Mr. Hammond, picked up the phone, so that you could
7 speak directly with Mr. Butner and Mr. Butner could hear
8 Mr. Hammond, to speak about the issue of witnesses who are
9 going to testify in the penalty phase being prevented to sit
10 during the trial on the guilt and innocence phase. That is
11 what the conversation was about.

12 Q. So you were in my pickup truck. I had my ear
13 phone on so that I could hear Mr. Butner; is that correct?

14 A. That's correct. And I could hear your end of the
15 conversation, to the extent I was listening to your end of
16 the conversation.

17 Q. And in anything that was translated from me to
18 you, having listened to Mr. Butner on the phone, did you get
19 any impression at all that Mr. Butner was asking whether the
20 judge might have been biased or anything other than totally
21 impartial?

22 A. No.

23 Q. Did anything that happened in that conversation
24 suggest to you that Mr. Butner might have been concerned
25 about whether the State of Arizona could get a fair trial?

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1 A. No.

23

2 Q. Would it be a fair characterization of your part
3 of that conversation that this was an extraneous off-the-cuff
4 remark by Mr. Butner in the course of a conversation about
5 another topic?

6 MR. BUTNER: Objection. She didn't hear
7 Mr. Butner's comment, Judge.

8 THE COURT: Overruled. You may answer.

9 THE WITNESS: Yes.

10 BY MR. HAMMOND:

11 Q. And in response to whatever Mr. Butner said that
12 you didn't hear, tell the Court again, so that we have it
13 clearly on the record, what you recall me saying, if you
14 recall at all.

15 A. What I recall, and I don't recall specifically,
16 but what I recall is you saying something like, "I didn't
17 hear that, but Anne heard something like that."

18 Q. And then tell the Court again what you recall
19 saying in response to that, if anything? Did you say
20 anything back to me to report to Mr. Butner?

21 A. No. No, you didn't ask me, and you were -- you
22 continued the conversation with Mr. Butner, and I was not
23 involved in the conversation that you were having with
24 Mr. Butner.

25 Q. So that we are clear about this, this is, then,

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1 not one of those situations in which there is a two-way
2 conversation back. You didn't provide information to me,
3 which I then turned around and provided to Mr. Butner?

4 A. No. You didn't ask me anything, and Mr. Butner,
5 as far as I could tell from your end, didn't ask you to ask
6 me anything.

7 Q. So the entire extent of the communication with you
8 had to do with what I said, Mr. Hammond said, you had said,
9 quote-unquote, something like that?

10 A. That I had heard something like that.

11 Q. Okay. At any other time in the last three or four
12 days have you had any communication with Mr. Butner in which
13 he asked you anything about what the judge had said in
14 chambers on Tuesday?

15 A. No. Mr. Butner has never asked me directly what I
16 heard or what I recalled.

17 Q. Do you communicate directly with Mr. Butner on
18 other matters?

19 A. Routinely.

20 Q. Do you have his cell phone number?

21 A. I do.

22 Q. Does he have yours?

23 A. He does.

24 Q. You are, in fact, the person who on a day-to-day
25 basis, at least recently, has had numerous direct

1 communications with Mr. Butner; is that correct?

2 A. Correct.

3 Q. But no communication with him directly on this
4 topic?

5 A. None.

6 Q. Whatsoever?

7 A. None.

8 MR. HAMMOND: Thank you.

9 THE COURT: Mr. Butner, redirect.

10 MR. BUTNER: Thank you.

11 REDIRECT EXAMINATION

12 BY MR. BUTNER:

13 Q. So, going back to this conversation that took
14 place through Mr. Hammond in the pickup truck, the
15 conversation started on speaker phone on Mr. Hammond's
16 telephone; is that correct?

17 A. Well, there was no conversation through
18 Mr. Hammond with you and I.

19 Q. I didn't ask you that, Ms. Chapman. I said the
20 conversation started -- the conversation that I had with, I
21 thought, you and Mr. Hammond, started on speaker phone with
22 Mr. Hammond's phone; is that correct?

23 A. I believe we dialed and you said "Hello" and you
24 said "I can't hear you," so that --

25 Q. So the conversation began on Mr. Hammond's

1 telephone; right?

26

2 A. That's correct.

3 Q. And it was on speaker phone at that point in time;
4 is that correct?

5 A. For a few moments, yes.

6 Q. At some point in the conversation I indicated to
7 you and Mr. Hammond I was having difficult hearing you?

8 A. Almost immediately, yes.

9 Q. And you only heard the half of the conversation
10 that was being uttered by Mr. Hammond once he took his phone
11 off speaker phone; is that correct?

12 A. Yes.
13 Q. And sometime during that conversation, Mr. Hammond
14 made the statement "I didn't hear that, but Anne did,"
15 something along those lines?
16 A. He said, "I didn't hear that, but I think Anne
17 heard something like that."
18 Q. I was the person saying what the statement was on
19 the other end; is that correct?
20 A. Yes. Mr. Hammond was speaking with you.
21 Q. Right. And I had basically inquired of
22 Mr. Hammond if he had heard the statement that Mr. Hammond
23 was commenting on; is that correct?
24 A. I assume so, but I didn't hear that.
25 Q. You didn't actually hear what I said to

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1 Mr. Hammond; is that correct?
2 A. Correct.
3 Q. So you did hear Mr. Hammond state to me "Anne
4 heard something like that"?
5 A. Yes.
6 Q. And what was your understanding at that time as to
7 what Mr. Hammond's conversation and my conversation was
8 about?
9 A. I didn't have one.
10 Q. Mr. Hammond consulted you, though; right?
11 A. No, he didn't.
12 Q. Pardon?
13 A. He did not.
14 Q. So was Mr. Hammond correct then when he said "Anne
15 heard something like that"?
16 A. Well, I don't know what you said to Mr. Hammond.
17 I recounted to you what I recalled Judge Lindberg saying

18 today.

19 Q. So you really don't know what Mr. Hammond and I
20 were talking about?

21 A. I wasn't on the call.

22 Q. So is that correct you didn't know what
23 Mr. Hammond and I were talking about?

24 A. No.

25 Q. And so when Mr. Hammond said "Anne heard something

1 like that," you didn't know what he was talking about?

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2 A. No.

3 Q. And you didn't correct him at that time?

4 A. I couldn't have corrected him because I didn't
5 know what he was talking about.

6 Q. I see.

7 MR. BUTNER: Excuse me for a moment, Judge.

8 Q. Before this telephone conversation that took place
9 between me and Mr. Hammond, and you were riding along with
10 him in the pickup truck, had you and Mr. Hammond had
11 discussions about the meeting that we had in chambers
12 concerning 404(b) evidence?

13 MR. HAMMOND: Your Honor, I object on
14 privilege grounds --

15 THE COURT: Sustained.

16 MR. HAMMOND: -- between any conversation
17 between the two of us.

18 THE COURT: Sustained.

19 MR. BUTNER: No further questions. Thank you.

20 THE COURT: You may step down.

21 Mr. Butner, you may call the next
22 witness.

23 MR. BUTNER: Judge, I would like to call
24 Mr. Hammond at this point, in light of the testimony by the
25 previous witness. He is the person I had the discussion

29

1 with.

2 THE COURT: Did you have a discussion with
3 Mr. Hammond about the specific thing that you were certain
4 Judge Lindberg said?

5 MR. BUTNER: Exactly.

6 THE COURT: And Mr. Hammond said "I didn't
7 hear that, but Ms. Osborn did." Is that what he told you?
8 I'm sorry, Ms. Chapman.

9 MR. BUTNER: That is basically what he said,
10 Judge.

11 THE COURT: Then why would you call him?

12 MR. BUTNER: To establish that I had made the
13 statement to him and it was of concern to me.

14 THE COURT: No. Call your next witness.

15 MR. BUTNER: I call Judge Lindberg to the
16 stand.

17 THE COURT: Very well.

18 THE BAILIFF: On his way, Your Honor.

19 THE COURT: Thank you.

20 THE CLERK: You do solemnly swear or affirm
21 under the penalty of perjury that the testimony you are about
22 to give will be the truth, the whole truth, and nothing but
23 the truth, so help you God?

24 THE WITNESS: I do.

25 THE COURT: Mr. Butner.

30

1 MR. BUTNER: Thank you, judge.

2 THOMAS B. LINDBERG,
Page 24

3 called as a witness, having been duly sworn, testified as
4 follows:

5 DIRECT EXAMINATION

6 BY MR. BUTNER:

7 Q. Judge Lindberg, please --

8 A. I think there is only one judge in the room at a
9 time.

10 Q. Please state your name for the record.

11 A. You may call me Mr. Lindberg, if you wish.

12 THE COURT: I believe if "judge" is your
13 title -- you can suit yourself, but he can certainly refer to
14 you as Judge Lindberg.

15 THE WITNESS: Okay. I appreciate either one,
16 then.

17 My name is Thomas B. Lindberg.

18 BY MR. BUTNER:

19 Q. What is your occupation, sir?

20 A. Judge of the Superior Court, Division Six, Yavapai
21 County Superior Court.

22 Q. And you are the presiding judge on the State
23 versus Steven Carroll DeMocker case; is that correct?

24 A. I have been.

25 Q. On March 30th of the year 2010, at approximately

31
1 3:00 p.m., I believe, did we have a meeting in your chambers
2 concerning this case?

3 A. We did.

4 Q. Was it an off-the-record meeting?

5 A. It was.

6 Q. No court reporter present?

7 A. That's correct.

8 Q. And present at that meeting were Mr. John Sears,
9 Mr. Larry Hammond and Ms. Anne Chapman on behalf of
10 Mr. DeMocker, and Mr. Paupore and myself on behalf of the
11 State?

12 A. Correct.

13 Q. Judge, do you recall how we were seated before you
14 at that meeting?

15 A. Not particularly.

16 Q. Okay. Do you remember that I was seated off to
17 your right on the side, and Mr. Hammond was seated in front
18 of you to your left, and Mr. Sears was seated in front of you
19 to your right?

20 A. Basically.

21 Q. And do you recall Ms. Chapman was seated back
22 behind the other gentlemen on the couch?

23 A. As she customarily has been.

24 Q. Okay. Thank you, Judge.

25 Do you recall that we -- that one of the

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1 main topics and one of the main reasons we were having that ³²
2 discussion was concerning 404(b) evidence of a sensitive
3 nature that we did not want to discuss in open court.

4 A. My understanding of the reason for the meeting was
5 some concerns about media coverage, and that the lawyers had
6 asked to see me off the record prior to the hearing
7 commencing.

8 Q. And do you recall that the discussion did turn to
9 some 404(b) evidence that the defense was concerned about the
10 State offering in it's case in chief?

11 A. Besides Miss O'non's testimony, yes.

12 Q. And you recall that the State indicated that we
13 are not going to be offering that type of evidence as part of

14 the State's case in chief, but we might be offering that type
15 of evidence if we reach the penalty phase?

16 A. Correct.

17 Q. And when the subject of the penalty phase came to
18 the Court's attention, do you recall making a comment about
19 the penalty phase?

20 A. I recall that I may have made a comment, yes.

21 Q. And what do you recall specifically, if you can,
22 what your comment was?

23 A. To the best of my knowledge, it was a comment
24 along the lines of, "if we reach the penalty phase," or "I
25 don't know that we will reach the penalty phase."

0

1 Q. Do you recall specifically the words that you
2 used?

3 A. I do not.

4 Q. Do you recall with specificity that you did not
5 say the words, "I don't believe we are going to get there"?

6 A. Since I don't hold that belief, I don't believe I
7 would have made that statement. Neither now nor on March
8 30th do I hold that belief.

9 Q. But you don't recall with specificity not saying
10 that statement?

11 A. I think I have answered that as best I can.

12 Q. Judge, do you recall -- I guess it was probably
13 on -- on or about March the 2nd of the year 2010, following
14 the argument concerning the constitutionality of the death
15 penalty statute vigorously argued by Mr. Hammond and then
16 counter argued, so to speak, by myself, do you recall asking
17 me about whether the State was continuing to evaluate the
18 death penalty allegation in this case?

33

19 A. I am not precisely sure of the timing on that, but
20 I do recall making comment about whether the State was
21 continuing to make evaluations about whether the death
22 penalty was or was not going to be sought.

23 Q. Judge, why did you ask me that?

24 A. To make a determination as to what the position of
25 the State was and whether there was some on-going evaluation

1 going on.

34

2 Q. You had previously made a judicial determination
3 that the -- that there was probable cause for three
4 aggravating factors for the death penalty in this case;
5 correct?

6 A. Correct, and I struck a couple of other factors.

7 Q. Right. And were you concerned at that point in
8 time that the State was continuing to proceed with this case
9 as a death penalty case?

10 A. I think whenever the ultimate sanction is being
11 requested by the government, it is always a concern. Proper
12 management of a death penalty case is different than
13 management of other types of cases.

14 Q. Were you concerned that there wasn't enough
15 evidence in this case to prove that this case was a death
16 penalty case?

17 MR. HAMMOND: Your Honor, objection.

18 First of all, these questions go beyond
19 the affidavit submitted by the State setting forth its basis
20 for seeking to have Judge Lindberg removed. But apart from
21 that, this process of questioning a judge about his mind on a
22 capital case, while he is still the presiding -- the judge
23 presiding over this, I think it is improper in the absence of
24 some foundation that I don't believe has been established

25 here at all.

35

1 THE COURT: Mr. Butner?

2 MR. BUTNER: Judge, this is about whether the
3 State can receive a fair and impartial trial in this case.
4 And the Judge has already indicated that he inquired of me --
5 after his prior determination that there were three death
6 penalty aggravators having been proved to a probable cause
7 standard -- he inquired of me as to whether we were
8 continuing to evaluate the allegation of the death penalty.
9 And I think that this inquiry is directed specifically at his
10 bias, and whether he can be a fair and impartial judge on
11 this case, and whether there is undue favoritism in favor of
12 the defendant, or undue antagonism against the State. And
13 quite frankly, it goes directly to the issue of the death
14 penalty case -- the death penalty in this case.

15 THE COURT: Well, with regard to the specific
16 question whether he had concerns about the quantum of
17 evidence that he believed at this point in the case that the
18 State could prove, I don't think shows any sort of bias. I
19 am not going to let you inquire into Judge Lindberg's
20 subjective state of mind on any issue other than with regard
21 to whether he harbors unreasonable bias or prejudice towards
22 the State.

23 Having said that, I am going to overrule
24 the objection and let you answer the question.

25 THE WITNESS: Could I have the question again.

36

1 MR. BUTNER: I will give it a shot. I think I
2 can get it.

3 Q. Were you concerned that there was not enough

4 evidence in this case for the State to proceed as a death
5 penalty case?

6 A. No.

7 Q. What was the reason that you asked that question,
8 Judge?

9 A. To ensure that both sides are going forward with
10 the case with a diligence that I think is required for a case
11 that requires that -- where the State has asked me for that
12 ultimate sanction.

13 Q. Did you ask that question in order to encourage me
14 to and the State to continue to evaluate the allegation of
15 the death penalty in this case?

16 A. Given that I think there is an ethical obligation
17 for the State to continue to do that, yes. And I received an
18 answer from you that indicated your compliance with my belief
19 that that is required.

20 Q. Judge, when you asked that question, were you
21 indicating your doubts to the State that we should proceed
22 with this as a death penalty case?

23 A. No.

24 Q. Do you have such doubts?

25 A. As to whether the State should proceed, I think

1 that is an executive branch decision. I don't think that I³⁷
2 can answer that.

3 Q. Well, the question is directed to you. Do you
4 have such doubts; yes or no?

5 A. As to whether the State should proceed with this
6 case as a death penalty case?

7 Q. Yes, Your Honor.

8 A. No, I think that is within your prerogative.

9 Q. And when we were having the off-the-record

10 discussion in chambers concerning the penalty phase --

11 A. On March 30th?

12 Q. On March 30th, correct. Thank you.

13 -- did you continue to have concerns as
14 to whether the State would be evaluating the on-going
15 allegations of the death penalty?

16 A. No, not really.

17 But I should note for the record that I
18 have had under advisement a motion by the defense with regard
19 to whether there should be some sanction for the State's
20 failure to comply with discovery orders, and one of the
21 remedies that they were suggesting was the removal of the
22 death penalty. So it was and is still an issue in the case,
23 potentially.

24 Q. Judge, have you ever presided over a death penalty
25 case before?

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1 A. Never.

2 Q. Are you morally opposed to imposition of the death
3 penalty?

4 A. No.

5 Q. Do you understand that your comments concerning
6 whether we were going to get to the penalty phase could cause
7 a party in this case to be concerned about your impartiality
8 in this case?

9 A. No.

10 Q. Do you think that your comments concerning whether
11 we would reach the penalty phase might demonstrate the
12 appearance of impropriety on your part?

13 A. I don't, because I recognize that the defendant is
14 presumed by law to be innocent. I engage in that. The

15 burden of proof is on the government to prove beyond a
16 reasonable doubt that he is guilty of the offense to begin
17 with. And then when the penalty phase is arrived at, it is
18 the jury's decision as to aggravating factors, the Court's
19 decision with regard to potential mitigating factors. To
20 some extent I recognize the jury makes a determination,
21 ultimately, of what the penalty phase is, whether the death
22 penalty will be given -- pardon me, that is the jury's
23 decision on mitigating factors also, and they can consider
24 things that are not even enumerated or argued by the parties.

25 And, therefore, since it is the State's

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1 burden and beyond a reasonable doubt, I don't -- I guess I ³⁹
2 don't see what you are seeing to file the motion.

3 Q. Judge, when you made the comment about whether we
4 were going to get to the penalty phase or not, you were
5 indicating your concern as to whether there was sufficient
6 proof even to convict the defendant; is that correct?

7 A. I have been a lawyer for 33 years, Mr. Butner. I
8 have been a defense attorney. I have been a prosecutor. I
9 have seen and handled many cases myself. I have been a judge
10 for nine and a quarter years, and I have seen many cases
11 where I think that the jury has reached a decision that I did
12 not expect.

13 And all my comment was indicating was
14 the -- all it was reflective of was that observation over the
15 years that though I may have found myself in agreement with
16 the jury decisions the majority of the time, I have been
17 quite surprised over the years by findings of not guilty when
18 I thought the verdict would be guilty; when there have been
19 findings of guilty when I thought the verdict would be not
20 guilty. And so whenever there is a jury trial, there is

21 question as to whether the findings will be commensurate with
22 what I believe the evidence would show.

23 So it was a probably flip comment not
24 intended to reflect any opinion that I have about the merits
25 of this particular case.

1 Q. But it was a comment that possibly we are not even⁴⁰
2 going to get to the penalty phase based on the evidence?

3 A. It was a comment that based on the law and the
4 presumptions of law and the evidence, some of which I have
5 already heard, that indicates there is always doubt on how a
6 jury is going to react to evidence. And I think that this
7 case, like many cases, could go in a variety of ways that
8 none of us anticipate at this point.

9 MR. BUTNER: If I would have just a moment,
10 Judge?

11 THE COURT: You may.

12 BY MR. BUTNER:

13 Q. Judge, as a result of me filing this motion, is
14 that going to cause you to be antagonistic toward the State
15 of Arizona in the presentation of this case and in the trial
16 in your court?

17 A. No, Mr. Butner.

18 MR. BUTNER: Thank you, Your Honor.

19 THE COURT: Mr. Hammond, you may cross
20 examine.

21 CROSS-EXAMINATION

22 BY MR. HAMMOND:

23 Q. Good morning, Your Honor. I am not able to call
24 you anything other than Judge. So if it makes anyone
25 uncomfortable, you will have to forgive me.

1 A. I am not uncomfortable with that, Mr. Hammond.

2 Thank you.

3 Q. This proceeding that initiated the prosecution
4 against Steven DeMocker began in October of 2008; is that
5 correct?

6 A. Correct.

7 Q. A homicide had occurred in July of that year, and
8 Mr. DeMocker was charged in October?

9 A. This is true.

10 Q. You were relatively promptly appointed to that
11 case?

12 A. After two other judges were noticed.

13 Q. There were two notices very early on, and then you
14 became the judge assigned to the case?

15 A. Correct.

16 Q. And from that day forward, from October of 2008
17 until this very moment, you have been the judge assigned to
18 and presiding over the case of Steven DeMocker versus the
19 State of Arizona?

20 A. Whichever way you wish to phrase the caption, yes,
21 sir.

22 Q. Maybe I have the caption backwards. That may say
23 more about me than about the case.

24 The passage of time in this case over the
25 last, now, year-and-a-half has brought us into your courtroom

1 for evidentiary hearings on -- it would certainly be fair to
2 say numerous occasions.

3 A. That's correct.

4 Q. There were hearings on motions to remand this case
5 to the grand jury?

6 A. There were.

7 Q. There were hearings on the conditions of
8 Mr. DeMocker's confinement?

9 A. Yes.

10 Q. There have been numerous hearings on matters
11 related to the production of documents and evidence in this
12 case?

13 A. That's true.

14 Q. There have been many of those hearings where
15 counsel simply argued motions, and a good many where there
16 have been evidence presented and heard by you?

17 A. That's correct.

18 Q. During that time period, you have come to know a
19 fair amount about the case, as inevitably you would, with the
20 kinds of issues that were presented here?

21 A. I believe so.

22 Q. Over a long period of time?

23 A. Yes, sir.

24 Q. You have issued numerous orders in this case on
25 all the topics I mentioned and others?

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1 A. Yes.

2 Q. You have been performing the judicial function in
3 this case on behalf of the judicial branch for that entire
4 period of time?

5 A. Yes, sir.

6 Q. I think I need to pause and ask you to provide us
7 a little bit more background about your tenure as a judge and
8 your tenure as a member of the legal profession. I never
9 thought I would be asking you these questions, but I think
10 for this record, I must do that.

11 Would you tell us, you graduated from law
12 school at the University of Arizona?

13 A. I did, in 1977.

14 THE COURT: Mr. Butner?

15 MR. BUTNER: Judge, I think this is
16 irrelevant.

17 THE COURT: Overruled. With all due respect
18 to Judge Lindberg, however, move through that very quickly.

19 MR. HAMMOND: I will.

20 Q. Would you summarize for us chronologically your
21 employment history as a lawyer following your graduation from
22 law school?

23 A. I worked briefly for an attorney named Albert Noe
24 in a private practice in Tucson. I worked for a law firm
25 named Davis and Montijo doing general practice on the east

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1 side of Tucson from 1978 through 1981. In -- excuse me, 44
2 through July 1979.

3 July 1979, the law firm I was working for
4 broke up, and I took a job as a prosecutor with the City of
5 Tucson, City Attorney's office. Was there from July '79
6 through July '81. Whereupon I was hired as a deputy county
7 attorney in Yavapai County.

8 I was a deputy county attorney for
9 Yavapai County Attorney's office from July 1981 through my
10 appointment to the bench, December of 2000. I was the chief
11 of the criminal division of the County Attorney's office when
12 Chick Hastings was the County Attorney between August of 1987
13 and December of 2000.

14 I was appointed by Governor Hull,
15 December 13th of 2000 to take the newly created Division Six.
16 I have been the judge of Division Six since then. I have

17 been elected twice since. Was assigned some matters --
18 criminal matters when I first became a judge, but very few,
19 because I had been the chief of the criminal division of the
20 County Attorney's office, and would have had conflicts. So
21 Judge Weaver, the presiding judge at that time, assigned me
22 principally to domestic relations and civil matters, probate
23 matters, with a few duties in the criminal area having to do
24 with new cases. So I did arraignments and initial
25 appearances, and had a fairly small percentage of the

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1 criminal case load, only dealing with cases that were filed⁴⁵
2 after my appointment.

3 I was assigned by Judge Brutinel to the
4 Verde branch of the county. Handled juvenile matters over
5 there, in addition to civil and domestic relations, probate
6 matters. Principally I had a small portion of the cases,
7 criminal cases, when I was judge in the Verde. That was 2004
8 to 2006.

9 2006 I came back here and was assigned to
10 principally a criminal case load.

11 Q. So then just to summarize very quickly, you have
12 spent just short of 20 years as a public prosecutor?

13 A. Actually 21-and-a-half years.

14 Q. Including the time in Tucson?

15 A. In Tucson.

16 Q. Putting this County Attorney's office together
17 with your Tucson experience.

18 A. Yes, sir.

19 Q. 21 years as a public prosecutor and about a decade
20 as a Superior Court Judge.

21 A. Only nine and a quarter.

22 Q. There are probably days that seems like more than
23 a decade.

24 A. It does.

25 Q. And for the last four years, your docket has been

1 primarily and maybe nearly exclusively criminal cases? 46

2 A. With just a couple exceptions.

3 Q. Have you had the opportunity over your years as a
4 member of the judicial branch in the state to become familiar
5 with the Code of Judicial Ethics that applies to judges in
6 this state?

7 A. I have.

8 Q. I take it we can all feel confident that you have
9 read those provisions that govern the conduct of judges in
10 this state?

11 A. I have.

12 Q. You know that the rules governing conduct have
13 been amended in the last couple of years after the American
14 Bar Association amended its rules to, in some ways, help
15 provide additional commentary and additional information with
16 respect to the roles of judges and the responsibilities that
17 they have in our judicial system?

18 A. Yes.

19 Q. You are familiar with the current and existing
20 rules on judicial conduct then?

21 A. Yes, sir.

22 Q. You understand that one of the touchstones of
23 those provisions of our judicial code is that a judge must
24 first of all be impartial?

25 A. Yes.

1 Q. A judge must also be fair and apply the law to the 47
Page 38

2 facts as honorably as he is able?

3 A. Yes, sir.

4 Q. And as you said to Mr. Butner, you also are aware
5 that a judge has responsibilities to assure that there is not
6 an appearance of judicial impropriety?

7 A. I understand that and agree with it.

8 Q. And you understand that often what appears may be
9 as important to the public as what, in fact, is the case?

10 A. This is true.

11 Q. Mr. Butner asked you about a hearing that occurred
12 back on the 2nd of March in this case, one of the innumerable
13 hearings, and you said that you recalled that hearing?

14 A. I didn't recall the precise date of the hearing.
15 I recalled the event.

16 Q. You recall that one of the matters considered that
17 day was what was entitled an omnibus challenge to the
18 Constitutionality of the Arizona death penalty?

19 A. Yes, sir.

20 Q. Filed on Mr. DeMocker's behalf?

21 A. Yes, by yourself I believe.

22 Q. And argued by me that day?

23 A. Yes, sir.

24 Q. You have ruled on that motion, have you not?

25 A. I have.

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1 Q. What was your ruling on that motion?

2 A. I upheld the use of the death penalty under the
3 Constitution of the United States and Arizona. I denied the
4 motion.

5 Q. And you recall, as well, that toward the end of
6 that lengthy afternoon of arguments, you did have a short

7 colloquy on the record with counsel in which you inquired
8 whether this matter -- whether the matter of the death
9 penalty was still under consideration in the office of the
10 Yavapai County Attorney?

11 A. I did.

12 Q. Did you in any way intend in asking that question
13 to suggest that you believed that it was inappropriate if the
14 county and its executive branch chose to proceed in the
15 manner it has, to continue to do so?

16 A. No. But I also recognize that there is great
17 expense in the death penalty litigation, that the jury
18 questionnaires were being considered and produced, that we
19 were going to go to great lengths to assure both sides that
20 we would have a fair and impartial jury through the use of
21 those questionnaires, and/or at least that it was under
22 consideration at the time. I don't remember precisely when
23 in the series of orders that that was finally decided, but I
24 knew that that was what the defense side, anyway, was looking
25 for was a questionnaire. And in order to implement the

1 questionnaire adequately, if the death penalty was still 49
2 going to be on the table, that there would have -- that there
3 would likely have to be questions as relate to the death
4 penalty. So I needed to know, still need to know, what the
5 State's position is with regard to that.

6 Q. And indeed, that process that you have described
7 of the jury questionnaires has gone forward?

8 A. Yes. The jury questionnaires have been filled out
9 on Monday, Thursday and today of this week.

10 Q. They are being filled out as we speak?

11 A. Yes, sir.

12 Q. And those jury questionnaires contain a number of
Page 40

13 death penalty related questions, because the death penalty is
14 still at issue in this case?

15 A. Yes, sir.

16 Q. Judge Lindberg, when you asked the question to
17 Mr. Butner about whether this matter, the matter of the death
18 penalty was still under consideration, did Mr. Butner suggest
19 to you in any way that he thought your inquiry was somehow
20 inappropriate?

21 A. I don't recall him responding in that fashion.

22 Q. We happen to have a record on this one. Do you
23 recall Mr. Butner suggesting anything to you about whether
24 asking such a question might demonstrate that you lacked the
25 ability to be fair and impartial in this case?

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1 A. No. To the contrary, he indicated that it was
2 always still under consideration in their office, is my
3 recollection of what his response was.

4 Q. Would it be unfair for a third party who observed
5 that conversation to come away believing that Mr. Butner
6 might even have appreciated the inquiry and have deemed it an
7 appropriate inquiry in the context of this capital case at
8 that time?

9 MR. BUTNER: Objection, Judge. Calls for
10 speculation about some third party.

11 THE COURT: Objection is overruled. You may
12 answer.

13 THE WITNESS: I think, given the nature of the
14 colloquy, I don't think anyone would have had a perception
15 that the Court was biased in favor or against the State or
16 the death penalty, or in favor or against the defendant.

17 BY MR. HAMMOND:

18 Q. Rule 10.1(b), Judge Lindberg, as you know,
19 requires that any party who discovers grounds that exist to
20 change a judge to do so within ten days. Ten days from March
21 the 2nd would be March the 12th. Any time within ten days of
22 March the 2nd, did the office of the Yavapai County Attorney
23 provide any notice to you that it had seen reason to doubt
24 your impartiality as a judge in this case?

25 A. You would know that as well as I, Mr. Hammond,

1 because they would be under obligation to provide that notice⁵¹
2 to you as well, but no, they did not.

3 Q. And since March the 12th, you have also received
4 no notice, until you came onto the witness stand this
5 morning, that the County Attorney might have any question
6 borne of any colloquy between the Court and counsel that
7 occurred a month ago on March the 2nd?

8 A. Correct.

9 Q. The affidavit from the County Attorney's office
10 will speak for itself, but there was no reference in that
11 affidavit to the proceedings of March the 2nd. We had a
12 brief conference with you in chambers this morning on the
13 record. Was any question raised with you at that time about
14 the propriety of the proceedings that occurred on March the
15 2nd in open court?

16 A. No.

17 Q. At any time before you came onto the witness stand
18 this morning, had anyone suggested to you that there might be
19 any question of your fairness and impartiality borne of any
20 comment you made in open court on the 2nd of March?

21 A. No. That was only raised -- any of these issues
22 were only raised under 10.1 with regard to what occurred on
23 March 30.

24 Q. Okay. Let's turn now to March the 30th. I think
25 you have given us your best memory, and I won't ask you to go

1 over that entire conversation again, but I do need to ask you ⁵²
2 whether you had as of that moment pre-judged how you believed
3 the trial phase of this case was going to go?

4 A. No, because I don't think that is possible.

5 Q. I guess it is conceivable that a judge could
6 decide in his own mind that whatever a jury might do, his
7 mind is made up. And I need to ask you that question.
8 Irrespective of what you know about the system, had you made
9 up your mind about what you believed would happen?

10 A. No.

11 Q. Had you made up your mind about what you believed
12 should happen in the trial of this case?

13 A. No.

14 Q. We know, all of us, that in a death penalty case
15 there are three phases. The first phase is the
16 guilt/innocence phase; correct?

17 A. Yes.

18 Q. Just to be absolutely clear about this, you are
19 telling us that you had not made up your mind, you had not
20 pre-judged in any way how you believed that phase of this
21 case would come out?

22 A. That's true.

23 Q. Either way?

24 A. That's true.

25 Q. There is, then, what is known as the aggravation

1 phase, assuming that there was a guilty verdict? ⁵³

2 A. That's correct.

3 Q. Have you in any way made up your mind about what
4 you believe either would happen or should happen with respect
5 to the so-called aggravation phase of this case?

6 A. No.

7 Q. So would it then be fair to say that when we talk
8 about the penalty phase, and particularly rebuttal of
9 mitigation, we are really talking about the third and final
10 stage of a death penalty case?

11 A. Yes, sir.

12 Q. And it is a third and final stage of a death
13 penalty case that we only get to if a jury finds guilt beyond
14 a reasonable doubt?

15 A. That's correct.

16 Q. And if the jury also finds the existing of
17 aggravating factors beyond a reasonable doubt?

18 A. That's true.

19 Q. And in your comment in chambers on March the 30th,
20 were you intending to imply anything other than that these
21 two steps have to occur before we ever get to the question of
22 what evidence will be presented in mitigation and what
23 evidence will be presented in response to mitigation?

24 A. I was not intending to convey anything other than
25 what you have said. There are contingencies that must occur

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1 before you get to that stage.

2 Q. Something that everyone in that room obviously
3 knew and has known for quite sometime?

4 A. I imagine so.

5 Q. Judge, you have had now a couple of hours to read
6 the affidavit that was filed this morning and to have a
7 conference with us in chambers on the record, and now you
8 have had an opportunity to appear here in court as a witness.

9 Do you believe in any way that you are not capable of
10 providing a fair and impartial trial in this matter?

11 A. No.

12 MR. HAMMOND: Give me just a moment, Your
13 Honor.

14 Thank you.

15 THE COURT: Mr. Butner, redirect.

16 MR. BUTNER: Thanks, judge.

17 REDIRECT EXAMINATION

18 BY MR. BUTNER:

19 Q. Judge Lindberg, in your answers to Mr. Hammond's
20 questions, you indicated one of the concerns that you had
21 when were you talking to me about whether the State was
22 continuing to evaluate the allegation of the death penalty
23 was the great expense in handling a death penalty case. Is
24 that correct?

25 A. That's correct.

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1 Q. And were you concerned at that point in time that⁵⁵
2 there was not sufficient evidence, as you had seen it in this
3 case, to proceed with this case as a death penalty case?

4 A. No.

5 Q. Why were you concerned about the expense at that
6 point in time?

7 A. Well, as I think all parties, including the Court
8 and -- or at least all of the lawyers are concerned, I think
9 we all recognize that the litigation in a capital case
10 involves a number of witnesses who would not otherwise be
11 required in a simple guilt or innocence phase process of any
12 other type of case, other than a capital case. The
13 appointment of mitigation specialists, if a defendant is

14 indigent, the reviews that are -- that if the death penalty
15 is imposed automatically occur in the Supreme Court, the
16 reviews that are conducted then on federal habeas corpus, the
17 protracted nature of the litigation, given what the current
18 economic times are, in particular, for the county and the
19 state, I wanted to ascertain that this was the direction in
20 which the local prosecutor's office, the Yavapai County
21 Attorney's office wished to proceed. And also thought that
22 that is a matter that should be reviewed on a consistent
23 basis over the course of time as further evidence is
24 discovered, having been assured by the County Attorney's
25 office that there was on-going discovery going on in the

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1 case.

2 Q. So, if I understand your testimony, as a result of
3 this great amount of expense, you felt that the allegation of
4 the death penalty was a matter that should be consistently
5 reviewed by the State?

6 A. Yes, and I was assured that it was.

7 Q. So, you actually were encouraging the State to
8 continue to review the allegation of the death penalty when
9 you made that inquiry; right, Judge?

10 A. It was an inquiry, not an encouragement.

11 Q. Is it part of your job duties to make sure that
12 not too much taxpayer money is spent in handling a case like
13 this, a death penalty case?

14 A. I wouldn't phrase it that way, no.

15 Q. But you were concerned about that when you made
16 that inquiry; is that correct, Judge?

17 A. That was one of the concerns, Mr. Butner, yes.

18 MR. BUTNER: I don't have any further
19 questions of this witness. Thank you.

20 THE COURT: You may step down, sir.

21 Mr. Butner, you may call the next
22 witness.

23 MR. BUTNER: I would like to call Mr. Paupore
24 to the stand, Judge.

25 THE CLERK: You do solemnly swear or affirm

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1 under the penalty of perjury that the testimony you are about⁵⁷
2 to give will be the truth, the whole truth, and nothing but
3 the truth, so help you God?

4 THE WITNESS: I do.

5 JEFFERY PAUPORE,
6 called as a witness, having been duly sworn, testified as
7 follows:

8 DIRECT EXAMINATION

9 BY MR. BUTNER:

10 Q. Please state your name for the record, sir.

11 A. Jeffery Paupore.

12 Q. And what is your occupation?

13 A. Deputy county attorney for Yavapai County.

14 Q. And were you performing your duties as a deputy
15 Yavapai county attorney on March 30th of the year 2010?

16 A. I was.

17 Q. Were you present in chambers, in Judge Lindberg's
18 chambers, on that date when an off-the-record discussion was
19 taking place?

20 A. Yes.

21 Q. Present in chambers at that time was Mr. Sears,
22 Mr. Hammond, Ms. Chapman, yourself and me, as well as Judge
23 Lindberg; is that correct?

24 A. Yes.

25 Q. Do you recall the discussion off the record with

1 no court reporter present turning to the topic of Rule 404(b)⁵⁸
2 evidence?

3 A. Yes.

4 Q. And thereafter, do you recall the subject of
5 discussion turning to whether the State was going to offer
6 certain types of 404(b) evidence, so to speak, that it was
7 not going to offer in its case in chief, but it was going to
8 offer it in the penalty stage of the case, if we reached that
9 point?

10 A. I do recall the conversation.

11 Q. Do you recall Judge Lindberg making any comments
12 when we touched upon that topic?

13 A. I do.

14 Q. Do you recall his comments or comment with
15 specificity?

16 A. I do.

17 Q. Where were you seated in the room?

18 A. I was seated just off of the judge's left, in
19 front of his desk and a little behind Mr. Hammond. More
20 offset behind Mr. Hammond and looking directly at the judge.

21 Q. And where was I seated?

22 A. You were across the room to my left, closer to
23 Judge Lindberg -- Judge Lindberg's right, just right of his
24 person and his desk.

25 Q. So you were off to the left, and I was off to the

1 right, and Mr. Hammond and Mr. Sears were in front of the
2 judge; is that correct?

3 A. That's correct.

4 Q. And Ms. Chapman was in the back seated on the
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5 couch?

6 A. She was in the back, kind of parallel in the room
7 as to where my position was.

8 Q. And when we touched on the topic of the penalty
9 stage of the case, what specifically did Judge Lindberg say?

10 A. I heard Judge Lindberg say that he did not believe
11 that we would get there, meaning the penalty phase.

12 Q. Did you thereafter bring that to my attention?

13 A. I did.

14 Q. And what was my reaction when you brought it to my
15 attention?

16 A. You recalled the same statement and were writing
17 it down or had written it down as to what you recalled.

18 Q. And were you concerned at that point in time about
19 Judge Lindberg's ability to be fair and impartial in handling
20 this case?

21 A. My first reaction when I heard the comment was I
22 was surprised. I was -- it was not solicited, so I was just
23 kind of -- that was quite a remark to make. And as I thought
24 about it and as we talked about it between you and I, I
25 became more concerned. I felt that he was commenting on the

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1 strength of the evidence.

2 Q. Did you interpret this as a flip remark by Judge
3 Lindberg?

4 A. I think it was. It was unsolicited. It just --
5 he just rolled it out there, and there was nobody else
6 speaking in the room at the time, so I clearly heard what he
7 said.

8 Q. Did this raise a serious question in your mind
9 about his ability to be fair and impartial in this case?

10 A. I have a great deal of respect for Judge Lindberg,
11 and I believe he is an honest and fair judge and works very
12 hard at his profession, but the comment struck me as
13 inappropriate based on the context of where we were in the
14 case and caused me -- caused me some concern.

15 Q. Did this appear to you to be an impropriety on
16 Judge Lindberg's part?

17 A. I didn't see the need for the statement to be made
18 in the first place. It wasn't as a result of a question or
19 inquiry by any other persons in the room. And I felt that it
20 was a glimpse or a snapshot, if you will, of his thought
21 process and his thinking about the case.

22 MR. BUTNER: No further questions of this
23 witness at this time.

24 THE COURT: Mr. Hammond.

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1 CROSS-EXAMINATION

2 BY MR. HAMMOND:

3 Q. Mr. Paupore, when did you get assigned to this
4 case?

5 A. I don't really recall, Mr. Hammond, because so
6 much has happened since I have been in the case, it is kind
7 of like a blur, quite frankly. It is a couple of months for
8 sure, might be longer.

9 Q. A couple of months would have put you back before
10 the 2nd of March?

11 A. It was before that.

12 Q. Were you in court the 2nd of March?

13 A. Yes, sir, I was.

14 Q. Did you hear the oral argument that afternoon?

15 A. Yes, sir, I did.

16 Q. Did you hear the comment that Mr. Butner asked
17 Judge Lindberg about, the comment that Judge Lindberg made
18 inquiring as to the County Attorney's review and process with
19 respect to the death penalty?

20 A. I did hear the judge address Mr. Butner in a
21 fashion such as you described.

22 Q. What do you recall about that?

23 A. It was at the very end of the -- I believe Judge
24 Lindberg had already made his decision, denying the
25 defendant's motion to find the death penalty

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1 unconstitutional. And it was towards the very, very end of⁶²
2 that hearing, Judge Lindberg asked Mr. Butner if the State
3 was looking at the propriety of the allegation of the death
4 penalty in the case, something to that effect. I can't say I
5 recall every word that he had spoken.

6 Q. Do you think he used the word propriety?

7 A. No. That is my word. Like I say, I did not
8 recall. I just recall him asking about whether the County
9 Attorney's office was evaluating continually or looking at
10 the allegation.

11 Q. And do you recall what Mr. Butner said in
12 response?

13 A. About the same fashion as I recall what the judge
14 said, that yes, he felt it was his obligation to always look
15 at that allegation in a case such as this.

16 Q. Did you think that there was something
17 inappropriate about Judge Lindberg's inquiry on that date?

18 A. Not at that time.

19 Q. Did you think there was anything that indicated
20 that he had pre-judged this case?

21 A. No. There was no way to read any of that into his
22 comments.

23 Q. On the 30th of March, the in-chambers conversation
24 that we were talking about, how long did that session last?

25 A. I believe we were scheduled for the hearings

1 scheduled for that day to commence at 2:30 and end at 5:00. ⁶³

2 But we did not, I don't believe, got on the record until
3 after 3:00. So I didn't time the entire meeting, but it was
4 at least 20 minutes long, I would guess.

5 Q. Do you remember while we were in chambers hearing
6 the three o'clock chimes on the clock outside?

7 A. Yes, I do.

8 Q. That would have been half an hour from the
9 scheduled time from the commencement of the proceeding?

10 A. You are right.

11 Q. Would it be fair to say, then, that the
12 conversation in chambers lasted at least half an hour?

13 A. I would agree with that.

14 Q. And maybe more?

15 A. And maybe more.

16 Q. So during that conversation, we all spoke about a
17 number of topics; isn't that right?

18 A. That's correct.

19 Q. This is not the only topic that we talked about in
20 that span of half an hour or 40 minutes?

21 A. My recollection that the reason for the
22 in-chambers meeting was to discuss the issue of whether the
23 court should be open or closed to avoid any leakage to the
24 public about what was going on.

25 Q. And that was with respect to the expected

1 examination of a witness who was to be heard that afternoon?

2 A. That's correct.

3 Q. There was a fair amount of conversation back and
4 forth about that particular matter?

5 A. Yes, sir.

6 Q. And the witness in question is someone who the
7 State has identified as someone from whom it intends or
8 intended to elicit evidence on a variety of subjects; isn't
9 that correct?

10 A. There was a wide range of topics that were going
11 to be discussed that day.

12 Q. I don't want to go into the details of them, but
13 it would be fair to say that there were more than half a
14 dozen and probably ten or more different topics that the
15 County Attorney's office expected or hoped to review with
16 that witness that afternoon?

17 A. I would agree with that.

18 Q. And the County Attorney's office had also said
19 that some of those topics were ones that your office would
20 not intend to introduce at the trial itself?

21 A. That's correct. And I do believe Mr. Sears was
22 trying to find out from Mr. Butner some of these areas of
23 evidence and if that evidence was going to be used in case in
24 chief. And we had discussions about that evidence.

25 Q. So the context here is that we have a long list of

1 evidence items, some of them the County Attorney might hope
2 to use in their case in chief?

3 A. Correct.

4 Q. And some of them the County Attorney would
5 acknowledge, and indeed had acknowledged in a pleading, would

6 be reserved for rebuttal?

7 A. Correct.

8 Q. Rebuttal at the mitigation stage?

9 A. Rebuttal at the mitigation stage.

10 Q. Not rebuttal in the merits phase of the case but
11 rebuttal at the mitigation stage?

12 A. Yes.

13 Q. And we then went through together that relatively
14 long list to talk about, if not all, most of those items of
15 evidence; isn't that correct?

16 A. Well, I don't know about a long list. There was a
17 couple of areas that Mr. Butner said the State was not
18 intending to use, and there were a couple of individual names
19 that were brought out that he said we were not going to call
20 in the case in chief.

21 Q. And then you recall that there was some
22 conversation, then, that as to some of these items there
23 would be no need to go into them today, or that day, March
24 the 30th, in court because those items would only become
25 relevant if we get down to the final stage of this case?

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1 A. Correct.

2 Q. And it was in the context of that particular part
3 of the conversation, was it not, in which the judge made the
4 comment that has caused your office to file its motion today?

5 A. It was at the very end of, I think, the session
6 in -- and in that part of the discussion about the penalty
7 phase of a trial that the comment was made.

8 Q. And what was happening at that moment was that we
9 were, all of us, agreeing that these matters that were going
10 to be considered, if at all, only at the mitigation stage,
11 need not be addressed today?

12 A. I believe that is accurate.
13 Q. Okay. And it was in that context that you believe
14 that judge said he didn't think we were going to get there?
15 A. He said, "I don't believe we are going to get
16 there." That is what I heard him say in that part of the
17 meeting.
18 Q. And I take it from your testimony here, you sat
19 here and listened to Judge Lindberg testify today, and you
20 heard what he said he remembered saying?
21 A. Yes, sir.
22 Q. I take it you disagree with him?
23 A. I disagree as to the exact words that I heard him
24 say. Yes.
25 Q. So having now heard him, do you contend on behalf

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1 of the State that Judge Lindberg is really not capable of ⁶⁷
2 providing a fair and impartial trial of this matter?

3 A. I have questions of that concern. Do I -- can I
4 say categorically that he cannot? No, I cannot. But the
5 comment was unsolicited. It came out, and like I said, I
6 think that was a snapshot into his thought process. So I
7 have my questions as this point, yes, I do.
8 Q. But in the last couple of months we have had
9 opportunities for lots of snapshots. At least since you have
10 been in the case, we have had numerous conferences with the
11 Court; isn't that true?
12 A. Yes, sir.
13 Q. Most of those, indeed almost all of them, have
14 been on the record?
15 A. Yes, sir.
16 Q. And on various occasions he has made comments

17 about how he either was ruling or intended to rule on -- I
18 couldn't begin to count -- but it is some scores of numbers
19 of motions?

20 A. Yes. And one -- today's hearings, as you know,
21 Mr. Hammond, are -- in the DeMocker case, deal with a
22 multitude of motions that address or -- and a part of the
23 defense is trying to preclude into the case, and some of it
24 is very material and important evidence to the State's case.
25 with the significance of what is at stake

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1 on these numerous pending motions, my concern about that
2 comment was can he be fair and impartial in deciding on these
3 multitude of evidentiary issues that is facing -- that he
4 will be facing, if he proceeds as the judge? And that caused
5 me great concern, in context with his comment on Tuesday,
6 March 30th.

7 Q. You also know, Mr. Paupore, that after that
8 in-chambers conference, we all walked out into the courtroom?

9 A. Yes, sir.

10 Q. Did you say anything about the concern you have
11 expressed this morning to the judge?

12 A. No, I did not.

13 Q. Did you say anything about the expression of
14 concern you have identified today to defense counsel?

15 A. No, sir.

16 Q. And indeed what happened after we finished that
17 in-chambers conference is we went into open court and --
18 sorry, not open court, into a sealed courtroom -- and had a
19 hearing?

20 A. We did.

21 Q. And at the end of that hearing, the judge ruled on
22 numerous matters relating to that particular witness?

23 A. At that 404(b) hearing, he did. Yes, sir.

24 Q. He ruled from the bench?

25 A. Yes, sir.

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1 Q. And in large measure he ruled against Yavapai
2 County?

3 A. I would agree with that.

4 Q. On most of the issues, he said you will not
5 present that testimony, not in these words, but you will not
6 present that testimony?

7 A. He precluded, if there were ten, and I don't have
8 a fixed number of how many issues, but if there were ten, he
9 probably precluded seven, the majority of them.

10 Q. And it was sometime after you received those
11 negative rulings that you and Mr. Butner had a conversation
12 about whether the judge could be fair and impartial?

13 A. Yes.

14 Q. And you said that when you had that conversation,
15 Mr. Butner said he had written down what he thought the
16 comment was?

17 A. He had written it down or was writing it down
18 exactly what he recalled, which is what I had recalled.

19 Q. When did that conversation occur?

20 A. I don't think we finished the hearings until close
21 to 5:30 that day, so it would have been shortly right after
22 that.

23 Q. Were you still in the courtroom?

24 A. No, sir.

25 Q. Where were you?

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1 A. In our office.

2 Q. Have you seen the written note that Mr. Butner
3 made?

4 A. Yes, I did.

5 Q. Do you have it?

6 A. No. No, sir, I do not.

7 Q. After you had the conversation with Mr. Butner,
8 did you and he agree on a course of action?

9 A. Not right away, no, sir.

10 Q. Did you talk about providing notice to the Court
11 of your concern?

12 A. The actual decision that brought us here today was
13 not made until late yesterday.

14 Q. You know that on Monday of this week, jurors began
15 to fill out the questionnaires that Judge Lindberg talked
16 about?

17 A. Yes, sir.

18 Q. You also know that that process continued again
19 yesterday?

20 A. I am aware of that.

21 Q. You know that in those two days an excess of 200
22 jurors have been brought into courthouses in Yavapai County
23 to fill out questionnaires?

24 A. I am not sure the number, Mr. Hammond, but I
25 know -- I heard there was something like 500 jurors that were

1 going to be filling out questionnaires. I am not sure if ⁷¹
2 that is accurate.

3 Q. Whatever that number is, it is a very large
4 number, and you knew that it was on-going and was going to
5 continue yesterday and today?

6 A. Yes, sir.

7 Q. And you did not choose to bring this matter to the
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8 attention of the judge until this morning?

9 A. That's correct.

10 MR. HAMMOND: I need just a moment.

11 Your Honor, before I conclude my
12 examination, I would like the County to produce the
13 handwritten note from Mr. Butner, so that we can, at least,
14 have it in the record.

15 THE COURT: Mr. Butner.

16 MR. BUTNER: Judge, I object to that. That is
17 asking for my personal notes concerning these matters. I
18 don't think that is appropriate. Those are privileged.

19 THE COURT: I don't want to see your notes,
20 except for that specific one. You are the one that asked the
21 question. You are the one that raised that such a note
22 existed. I would like to see it.

23 MR. BUTNER: No, I am not, Judge. I never
24 mentioned that such a note --

25 THE COURT: You asked about the conversation

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1 with Mr. Paupore, and your specific concerns that you shared,⁷²
2 and I thought you specifically said you made a note.

3 MR. BUTNER: No, I did not, Judge. That came
4 up in Mr. Hammond's question. I did not mention that I made
5 a note. We discussed the specific language.

6 THE COURT: Do you have it, Mr. Butner?

7 MR. BUTNER: I think I might, Judge.

8 THE COURT: I would like to see it.

9 MR. HAMMOND: Your Honor, just so the record
10 is clear, and I often don't trust my memory -- it is good to
11 have the court reporter here -- but I do believe that the
12 testimony about Mr. Butner writing down a note came from a

13 question Mr. Butner asked Mr. Paupore on direct examination.

14 MR. BUTNER: Please note my objection for the
15 record, Judge.

16 THE COURT: I note your objection. Go ahead
17 and bring it up here. Joe, if you would come on up. I don't
18 want to read your notes. I want to see that specific
19 notation.

20 MR. BUTNER: Yes, sir.

21 THE COURT: Specifically, for the record, it
22 says, quote, I don't think -- the think is scratched out --
23 it says "believe" we are going to get there. It makes
24 reference to the fact that that was Judge Lindberg's
25 statement.

□

1 Thank you, Mr. Butner. That is what it⁷³
2 says. You don't need to see the rest of his notes. That's
3 what it says.

4 MR. HAMMOND: I'm sorry. Could I have the
5 court reporter read back what the Court just said.

6 THE COURT: You may.

7 (Whereupon, the relevant portion
8 of the record was read back.)

9 THE COURT: The word "think" is scratched out.
10 It is written in "believe."

11 MR. HAMMOND: So, Mr. Butner's note itself has
12 the word "think" crossed out and the word "believe."

13 THE COURT: That's correct.

14 MR. HAMMOND: So if you read it without the
15 crossed out, it would be, "I don't believe we are going to
16 get there"?

17 THE COURT: Correct.

18 MR. HAMMOND: I don't have any further
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19 questions for this witness.

20 THE COURT: Mr. Butner, redirect.

21 MR. BUTNER: No further questions.

22 THE COURT: Sir, you may step down.

23 Mr. Butner, do you wish to call any
24 additional witnesses?

25 MR. BUTNER: No, Your Honor.

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1 THE COURT: Mr. Hammond, do you wish to call⁷⁴
2 any witnesses?

3 MR. HAMMOND: May I have a moment, Your Honor?

4 THE COURT: You may.

5 MR. HAMMOND: Your Honor, I would like to call
6 Larry Hammond to the stand.

7 THE COURT: I precluded Mr. Butner from
8 calling you. I would be interested in knowing about what.

9 MR. HAMMOND: I do want to answer under oath
10 questions about my memory of what happened in chambers.

11 THE COURT: Mr. Butner, I precluded you from
12 it. Do you have an objection to that?

13 MR. BUTNER: Yes, I do.

14 THE COURT: I am not going to let you testify,
15 Mr. Hammond.

16 MR. HAMMOND: Thank you.

17 THE COURT: Mr. Butner, I will hear from you.

18 MR. BUTNER: Judge, this is strange new ground
19 for me. And I filed this motion, as I stated earlier, with
20 much trepidation. But I do believe what happened on March
21 30th is, as Mr. Paupore put it, we did get a snapshot into
22 Judge Lindberg's mind concerning this case.

23 If you will recall the testimony, of

24 course, from Judge Lindberg, he didn't specifically recall
25 what he said. He had two comments that basically indicated

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1 something along the lines of, if we reach the penalty phase,⁷⁵
2 something along those lines. Ms. Chapman didn't have a
3 specific recollection of the comment, either. The only
4 witness that we have had with a specific recollection was
5 Mr. Paupore. And, of course, I offered my affidavit.

6 I heard that comment. This was before
7 the evidentiary hearing. I realize this isn't part of the
8 record at this point, but we were running -- it is part of
9 the record that we were running behind, and as we often do in
10 this case, and so we went into court and got on with the
11 hearing. We had a witness that was under subpoena and
12 waiting, and it went -- I think it probably went longer than
13 everybody had anticipated. It filled up the day.

14 There wasn't an opportunity to discuss it
15 at that point in time. Thereafter, there was opportunity to
16 discuss it. It seems to me, Judge, that in looking back,
17 coupled with Judge Lindberg's inquiry about whether the State
18 was continuing to review the allegations of the death
19 penalty, that Judge Lindberg was expressing bias and
20 prejudice when he made that comment about "I don't believe we
21 are going to get there," concerning the State's case.

22 He, according to his testimony now, I
23 think it is more understandable, he was apparently concerned
24 about the great expense that we are all going to in this
25 case, in terms of putting this case on, but I think he also

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1 was concerned about the level of proof, so to speak, because⁷⁶
2 he had already ruled on the aggravating factors in this case,
3 in terms of whether probable cause existed to get to the

4 penalty phase, if and when there was a conviction. So that
5 comment was specifically directed, if you will, to the level
6 of proof of, I don't think you are going to get a conviction.
7 That's the way --

8 THE COURT: You cited the State versus Henry
9 and State versus Peralta which makes it pretty clear that it
10 isn't a manifestation of bias or prejudice, which is my
11 understanding as well, to comment based upon the evidence
12 that you have already heard.

13 Assuming that he said what you are saying
14 he said, how is it bias and prejudice?

15 MR. BUTNER: Judge, we have had on-going
16 litigation in this case. This has been a battle all along
17 the way, you know, and that is really, probably the way it
18 should be. But the judge doesn't know all of the items of
19 proof that the State has at this point in time even. And for
20 him to make that comment at that point in time, saying "I
21 don't believe we are going to get there," is a comment that I
22 don't believe you are ever going to have enough evidence to
23 get there. Not looking in retrospect, that is a comment
24 directed toward the future, "I don't believe we are going to
25 get there, Mr. Butner." He didn't say Mr. Butner. But I, of

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1 course, listened to that. I was very surprised to hear that⁷⁷
2 and taken aback, and obviously, very concerned.

3 This has been a difficult case to
4 litigate. There have been numerous motions filed by the
5 defense in this case. The thrust of many of these motions is
6 that the State is not disclosing in a timely fashion. They
7 are running behind in terms of their investigation. And we
8 have got a trial date, and they are not giving us all of

9 their evidence, et cetera.

10 Well, the State has been continuing to
11 investigate this case all along, as is our duty, as is our
12 obligation. And we are disclosing the evidence, basically,
13 as fast as we get it. And for the Court to make that
14 comment, it demonstrated to me that there was undue
15 antagonism that had been developed as a result of this
16 litigation toward the State's case, toward the Yavapai County
17 Sheriff's Office. And it demonstrated, and I think quite
18 clearly, was a remark that was not appropriate at the time.
19 It was a flip comment, as the judge alluded to. It was a
20 remark at the time that "I don't think you are going to get
21 there." That was the tone.

22 And I think it demonstrated that the
23 judge -- that we are not dealing with a level playing field
24 here. That we are digging out of a hole in front of this
25 judge, and he doesn't think we are going to get there. And

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1 he has pre-judged this case at that point in time, that he 78
2 doesn't think the State is going to get there. That's not
3 right. That clearly is inappropriate on his part. That
4 clearly sends a message to the State. "I don't think you are
5 going to get there."

6 And I think it also indicates that he
7 didn't believe -- and that is why I referred in my affidavit
8 to the March 2nd colloquy that he and I had, he doesn't
9 believe that the State should have filed the death penalty
10 allegation in this case, despite the fact that there was
11 sufficient proof to a probable cause standard for three
12 aggravators.

13 THE COURT: whether he believed it or not, he
14 was able to set aside any personal belief you might think he

15 has, and rule as required to do by the facts in the law.

16 MR. BUTNER: He was in that regard and in
17 regard to those aggravators, Judge. But when he made that
18 statement about "I don't believe you are going to get there,"
19 I don't think at that point in time that he was unbiased any
20 longer. I don't think -- I think he demonstrated clearly
21 that he was no longer impartial. And we're in a difficult
22 position with him. And so that's what gives rise to this
23 notice for cause.

24 THE COURT: Well, thank you, Mr. Butner.
25 Mr. Hammond.

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1 MR. HAMMOND: I believe that the question that ⁷⁹
2 this Court is required to answer under our rules is whether
3 you find by a preponderance of the evidence presented that
4 the judge in this case, Tom Lindberg, is not capable of and
5 is not providing a fair and impartial hearing in this case,
6 both to the State and to the defense.

7 The shortest and simplest answer is that
8 the evidence presented here does not support that finding.
9 If we were simply talking about differing memories of a
10 conversation in chambers in the course of a case in which
11 there have been countless conversations, both off the record
12 and on, I would submit even if you were to find that
13 Mr. Paupore's memory is the correct memory, it would not
14 constitute a basis for finding that this judge is not capable
15 of being fair and has not been fair and impartial.

16 But Judge Lindberg came in here, and
17 under oath said that he could not have made that statement.
18 He has a memory that it was logical to say, and he did say
19 something about, we will deal with these penalty phase issues

20 if we get there. That doesn't sound to I think any of us, at
21 least on the defense side, as a pre-judgment of the case.
22 But whatever that comment was, I would submit to you, that it
23 does not constitute a basis under Rule 10 for disqualifying
24 this judge. Nor does it constitute a basis under the canons
25 of judicial ethics to call into question whether this judge

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1 can do the job assigned to him as a member of the judicial 80
2 branch.

3 The statement we made this morning in
4 Judge Lindberg's court, I will make again here today. We
5 believe that this motion has been filed in bad faith. We do
6 not believe there is a good faith basis for questioning
7 whether this Yavapai County Superior Court judge is anything
8 other than someone who is trying his best to be fair and
9 impartial.

10 And I must say, the irony of this is
11 weighing on us this morning. We have, over the last 16
12 months, lost countless motions. Our client is still in
13 custody today, despite numerous efforts by us to have his
14 bond reduced, to have his conditions of confinement changed.
15 At one point the Court ordered that he be allowed to have a
16 computer in his cell, so that he could help manage and review
17 some of this evidence and assist in his defense. Mr. Butner
18 and the county then objected to it, and the judge withdraw
19 his order.

20 If this Court were actually going to try
21 to figure out whether Judge Lindberg has been and can be
22 capable of being a fair and impartial judge, we submit to you
23 that you would have to review the record of what he's done
24 over the last 16 months. And I suspect at the end of that
25 time, if this Court were ever to do that, you would probably

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1 have to say he either has exhibited no comment that would
2 constitute a lack of fairness and impartiality, or maybe he
3 is being unfair and impartial to the defense. But we aren't
4 standing here making that argument.

5 We have been at this job a long, long
6 time. We are on the lip of trial. We have jurors here. We
7 were at a point at which everyone knows that we are facing a
8 long and difficult death penalty trial, and at the last
9 moment this County Attorney's office has come in and
10 attempted to stop the show. Attempted to prevent us from
11 arguing and deciding a large number, I think there was 16
12 motions that are to be heard today, so that we can at least
13 attempt to get ourselves prepared for trial, and the county
14 doesn't want to do that. The county knows that if this court
15 does not disqualify Judge Lindberg, we will be proceeding
16 with those motions and we will then be proceeding to the
17 trial that Mr. DeMocker is entitled to under the Constitution
18 of Arizona and the United States.

19 In sum, we simply don't believe there is
20 any basis for this motion or for the suggestion that this
21 judge should be removed from this case for cause.

22 Thank you.

23 THE COURT: Thank you, Mr. Hammond.

24 Did you wish to reply, Mr. Butner?

25 MR. BUTNER: Judge, I do.

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1 First of all, I note that the Court
2 accepted my avowal at the outset of these proceedings that
3 this motion was not made in bad faith and not for the purpose
4 of delay, and it is not.

5 The State wants to proceed to trial on
6 this case. We all want to get this case tried. We want to
7 get this case done. But the fact of the matter is that that
8 comment was made. It is unfortunate that we weren't making a
9 record at the time. But Judge Lindberg didn't testify that
10 he could not have made that statement. He didn't have a
11 specific recollection, unlike Mr. Paupore.

12 I understand the argument that, okay, we
13 will give you that, that is exactly what Judge Lindberg said.
14 That still doesn't demonstrate that he cannot be fair and
15 impartial in this case. I would disagree. It does
16 demonstrate that he is looking into the future, that he has a
17 prejudice or a bias at this point in time, and that he
18 doesn't think the State is ever going to be able to make
19 their case to convict Mr. DeMocker.

20 That is not appropriate. That is an
21 undue prejudice. That is an undue antagonism toward the
22 State's case. And it is inappropriate for such a comment to
23 be made, and it is inappropriate for Judge Lindberg to remain
24 as the trial judge on this case because he has demonstrated
25 that he cannot be fair or impartial.

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1 THE COURT: Thank you, Mr. Butner.

2 I guess my initial impression is that we
3 were trying to read a tremendous amount into the eight words
4 spoken at the end of -- somewhere between half an hour and
5 hour and a half off-the-record conversation in chambers
6 regarding evidentiary issues. We always take extremely
7 seriously the requirements of the Arizona Constitution and
8 the requirements of the canons of judicial ethics that we
9 both be unbiased and we appear to be unbiased.

10 However, as a practical matter, Judge
 Page 68

11 Lindberg's explanation of what he believed went on makes
12 sense. Ms. Chapman's explanation makes sense. But at the
13 end of this conversation, Judge Lindberg concluded that
14 whatever you decided to do with regard to the penalty phase
15 of this case, we are not there yet. That is something that
16 is going to be decided in the future.

17 You cite me to the law. You cite me to
18 State versus Henry. You cite me to State versus Peralta.
19 That is my understanding of the law, as well. Judge Lindberg
20 would have to have actually manifested some sort of spirit of
21 ill will or hostile feeling.

22 As a factual matter I do find, to the
23 extent we have any idea what Judge Lindberg's comment was,
24 the comment was not yet ripe for a distinction. As a matter
25 of law, I am inclined to agree with Mr. Hammond, even if

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1 Judge Lindberg said specifically what you have in your notes,
2 it would not rise to a level of bias and prejudice as I
3 believe is required by the Rule and by Arizona Case Law to
4 require Judge Lindberg to be removed from this case.

5 I, by the way, don't find anything
6 improper in asking either side whether they have complied
7 with their ethical duties regarding the case, whether it is
8 asking you whether or not you continue to evaluate the
9 request for the death penalty in light of the evidence as it
10 develops, or to ask the State whether they are properly
11 representing their client, or if the defense is properly
12 representing their client.

13 Short answer is while I don't find that
14 the motion is brought in bad faith, I do find that the motion
15 is not well taken, and it is denied, and the matter is

16 referred to Judge Lindberg for all further proceedings.

17 Thank you.

18 (whereupon, these proceedings were concluded.)

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I, ROXANNE E. TARN, CR, a Certified Reporter
in the State of Arizona, do hereby certify that the foregoing
pages 1 - 84 constitute a full, true, and accurate transcript
of the proceedings had in the foregoing matter, all done to
the best of my skill and ability.

SIGNED and dated this 4th day of April, 2010.

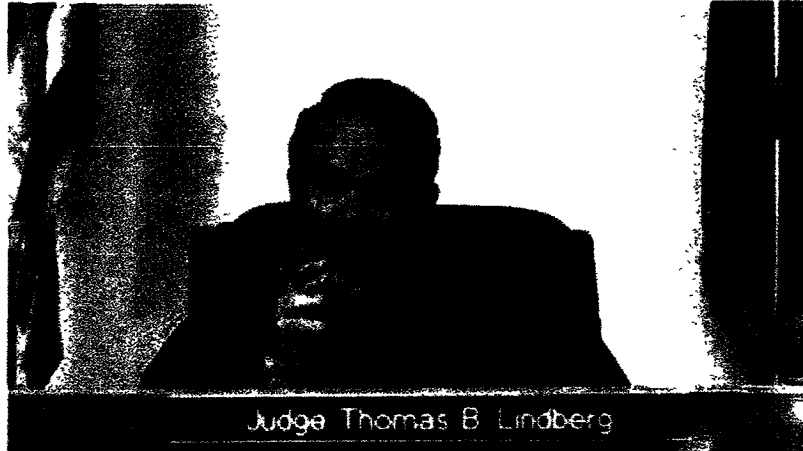
ROXANNE E. TARN, CR
Certified Reporter
Certificate No. 50808

4/3/2010 10:00:00 PM

Prosecutors try to ax judge in DeMocker case



By Linda Stein
The Daily Courier



Judge Thomas B. Lindberg

Les Stukenberg/The Daily Courier, file
Judge Thomas Lindberg makes a point to defense and prosecuting attorneys in this file photo.

In a rare move, the Yavapai County Attorney's Office filed a motion Friday asking that the judge hearing the Steven DeMocker capital murder case be removed, claiming an offhand remark that he made showed "undue or deep-seated favoritism toward the defendant."

After listening to arguments, Presiding Judge Robert M. Brutinel denied that motion, allowing the May 4 trial to go forward.

DeMocker, 56, a Prescott stockbroker, stands accused of first-degree murder in the July 2, 2008 slaying of his former wife, Carol Kennedy. Kennedy, 53, was bludgeoned to death in her Williamson Valley home, three months after the couple divorced. A judge awarded her \$6,000 a month alimony and half of a retirement account in the divorce settlement. Prosecutors allege that financial gain motivated DeMocker, who claims he was riding a mountain bike on a trail at the time of his ex-wife's demise, to strike Kennedy repeatedly with a golf club.

Deputy County Attorney Joseph C. Butner III said that Superior Court Judge Thomas B. Lindberg made the remark that showed "undue or deep-seated antagonism towards the Yavapai County Sheriff's Office and the state" during a discussion in his chambers on Tuesday. During the discussion, Butner told the judge he didn't plan to introduce certain evidence during the guilt phase but would during the penalty phase.

In a death penalty case, a jury must first determine if the defendant is guilty, then if there are aggravating circumstances, and finally whether to sentence the defendant to death.

"I don't believe we're going to get there," Butner quoted Lindberg as saying about the death penalty phase.

"We feel as if we're not going to get a fair and impartial trial from Judge Lindberg on the basis of the comment," Butner said. That comment "shows he's not unbiased."

Butner called Lindberg in to testify before Brutinel. Lindberg recalled the meeting but did not remember his exact words.

"To the best of my knowledge it was along the line of 'If we reach the penalty phase' or 'I don't know if we will reach the penalty phase,'" Lindberg said. As to what Butner claimed to have heard, Lindberg said, "I don't believe I would have made that statement." But the judge conceded, "It was probably a flip comment never intended to reflect the merits of this case."

Lindberg denied pre-judging what verdict the jury might reach, noting that in his 42 years of experience as a lawyer and a judge, juries often surprise him.

Butner also took issue with Lindberg asking him whether the state continued to evaluate whether it should seek the death penalty in the DeMocker case.

"Whenever the ultimate sanction is being requested by the government, it's always a concern," Lindberg said.

Butner asked, "Were you concerned there wasn't enough evidence in this case for the death penalty?" Lindberg told him no, that it was the prosecutor's decision, not the judge's. Lindberg, a former deputy county attorney, said he'd never presided at a death penalty case but does not oppose capital punishment.

Defense lawyer Larry Hammond demanded to see the notes that Butner made on Lindberg's remark and Brutinel insisted that Butner hand them over.

Hammond accused Butner of bringing the motion after Lindberg ruled against the state during a closed-door hearing on Tuesday.

"We believe this (motion) has been filed in bad faith," Hammond said. Lindberg has been "fair and impartial" during the many pretrial hearings and denied many defense motions.

"We're on the lip of trial. We have jurors here. At the last moment this county attorney's office has attempted to stop the show ... the trial Mr. DeMocker is entitled to. There is no evidence this judge is biased."

Butner hotly denied he acted "in bad faith."

"The fact of the matter is, that remark was made," he said. "It does demonstrate he's looking into the future. He has a prejudice or bias and said we will never be able to make this case."

However, Brutinel said it made sense to delay discussion of penalty phase evidence until that juncture. And even if Lindberg made the remark as Butner alleges, court rules do not require his removal, Brutinel said.

3/30/2010 10:01:00 PM

Search and rescue teams search waterways for Carol Kennedy murder evidence



By Lisa Irish
The Daily Courier



Volunteers with the Pima Search and Rescue unit have helped the Yavapai County Sheriff's Office look for evidence for the past week in the murder case against Steven **DeMocker** in the July 2, 2008, bludgeoning death of his former wife.

Les Stukenberg/The Daily Courier
The Pima and Yavapai County Search and Rescue teams look in a pond near the 12th hole of the Hassayampa Golf Club on Monday. The teams have been looking in local golf course lakes and ponds for evidence related to the Carol Kennedy murder trial.

DeMocker, 56, a Prescott stockbroker, faces a May 4 trial date on charges he beat his former wife, Carol Kennedy, 53, to death with a golf club to avoid paying \$6,000 a month alimony and splitting an individual retirement account.

Teams with divers from both sheriff's offices have been searching golf course waterways in Prescott, a spokesman said.

The searchers use boats with imaging systems and divers to search water hazards along the Prescott Lakes golf course and Granite Basin, said Deputy Shawn Deegan with Pima County Search and Rescue. The searchers also used ATVs to scour nearby areas.

They searched the lake along the Hassayampa golf course as well, said Dwight D'Evelyn, spokesman for the Yavapai County Sheriff's Office.

"The search of bodies of water around Prescott is related to the **DeMocker** case and pertains to evidence in the case," said Dwight D'Evelyn, spokesman for the Yavapai County Sheriff's Office. "We can't comment any further since it is an ongoing investigation."

Yavapai County Det. John McDormett asked the Pima County Search and Rescue team to assist the Yavapai County Sheriff's Office in their search for evidence, so they sent 16 volunteer members of their organization here to help, Deegan said.

"The recovery at the lake is sensitive," Deegan said.

APRIL 7, 2010
11:37 A.M.

PRETRIAL MOTIONS

APPEARANCES:

FOR THE STATE: MR. JOE BUTNER AND MR. JEFF
PAPOURE.

FOR THE DEFENDANT: MR. JOHN SEARS, MR. LARRY
HAMMOND AND MS. ANNE CHAPMAN.

(THE FOLLOWING IS A PARTIAL TRANSCRIPT OF THE
PROCEEDINGS HELD ON APRIL 7, 2010:)

MR. SEARS: I will give an example. The State
has disclosed a man named Rod Englert. There are several
motions dealing with Mr. Englert. Mr. Englert is disclosed
as an expert on crime scene and blood spatter. And he has
prepared a report, which was disclosed to us in September of
2009. We've had some discussions with the State about him.

When we contacted Mr. Englert in the last
few days, he told us that he was shocked that he was on the
state's witness list, that he didn't write the report, an
associate wrote it. He simply signed off on it, that he had
never seen any evidence, he had never visited the scene. He
had been asked to express opinions on evidence based on
photographs and police reports, and was told that his
services were no longer required for budgetary reasons in
September.

We had been asking the State repeatedly
day after day, are you going to call Rod Englert? Is he a

witness? What are you going to do about that? And we were
told, you contact him. He is on our list. He is a witness.
That is the information we have today about Mr. Rod Englert.

We are a month from trial. Somehow,
someplace there has to be an answer. We tried to get the

6 State to do it. I think the Court tried its very best to get
7 the State to do it. Now it is time to just take the judicial
8 red pen out and say, as to these people, there is nothing
9 that the State has presented that is even close to the
10 sufficient proffer that would justify these people being on
11 the witness list. These people are precluded.

12 MR. BUTNER: If I might, Judge. Something new
13 just came up.

14 THE COURT: I want to hear back from you,
15 Mr. Butner.

16 MR. BUTNER: Right.

17 Concerning Mr. Englert, first of all, he
18 has provided a written report as to what he would testify
19 about. That was disclosed to the defense.

20 Secondly, it is not mentioned -- he is
21 not mentioned in any of this about a proper proffer, so to
22 speak. He is an entirely new witness that they bring up out
23 of the blue.

24 Thirdly, we have had discussions on-going
25 about how we were going to arrange for Mr. Englert's

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1 interview. And the defense continually requested, well, how³
2 about you pay for the interviews of your witnesses, and we
3 will pay for the interviews our witnesses. I was initially
4 amenable to that, but I had to get authority from my bosses
5 in order to do that.

6 We then had a problem with another
7 witness in terms of the way that that payment worked out.
8 They have told me I can't do that. If the defense wants to
9 interview somebody, they are going to pay that expert witness
10 to interview them.

11 The defense went around me to contact

12 Mr. Englert. I was going to set up an interview with
13 Mr. Englert for the defense. They went around me and then
14 come up with this stuff out of the blue. I don't think that
15 is really appropriate or kosher, and it certainly has nothing
16 to do with a proper proffer in this case.

17 This is another example of the defense
18 conjuring up disclosure problems when we are attempting to
19 cooperate with them. I see Mr. Sears smirking again. Judge,
20 I don't like this kind of litigation. This is a shot in the
21 dark that was not mentioned in the written motion, and it is
22 highly improper.

23 THE COURT: Are you calling Mr. Englert?

24 MR. BUTNER: Yes. We are calling him. He was
25 specified as an expert witness. His opinions were disclosed

1 months and months ago. And then, I guess, the defense
2 decided, we will see if we can shoot him out of the water.
3 We will go behind the prosecutor's back with our investigator
4 and see if we can do that. And, apparently, that's what they
5 are trying to do.

6 THE COURT: Are they allowed to contact expert
7 witnesses on their own?

8 MR. BUTNER: You know, I think they are,
9 Judge, but as a matter of decorum, we try to help and assist
10 and set up interviews just as we have done in this case with
11 one of our experts, so to speak, and are willing to do so
12 with others.

13 THE COURT: Mr. Sears.

14 MR. SEARS: Your Honor, perhaps Mr. Butner
15 over the noon recess might wish to talk to Mr. Sechez, his
16 investigator, who advised us that we should contact

17 Mr. Englert. That is why we did it. That is the sole
18 reason. I would be happy to put on Mr. Robertson some day
19 under oath to tell you that, probably Mr. Sechez to tell you
20 the same thing.

21 I was not smirking. My back hurts. I
22 was wincing when I got up. There is nothing funny about
23 this. Mr. Butner is quite right.

24 But Mr. Englert's situation arose in the
25 last couple of days. As I said before, we are having trouble

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1 filing motions fast enough to keep up with the circumstances⁵
2 as they change them. If the Court needs a motion and
3 Mr. Butner needs a motion, we will file a motion about
4 Mr. Englert. I am simply reporting to the Court and
5 Mr. Butner -- and by the way, this isn't a surprise. We sent
6 Mr. Sechez an interview saying -- an e-mail saying, you might
7 want to talk to Mr. Butner. Here is what Rod Englert told us
8 about his situation in the case.

9 I point that out because we are chasing
10 around after their experts, and we finally reach an
11 agreement -- I don't need to burden the Court with the
12 dispute about who is going to pay for these. I wish
13 Mr. Butner had chosen a time other than this morning in court
14 to announce this change in the policy. I believe we had an
15 agreement, not just a suggestion, an agreement that the State
16 would pay for their experts and we would pay for ours.
17 Apparently that is not true. We will act accordingly.

18 I think the Court is right. There is no
19 prohibition against us contacting any of the State's
20 witnesses, who are not victims in this case. But we were
21 trying not only to observe the customary practice in Yavapai
22 County, the decorum that Mr. Butner is seeking, but also the

23 specific suggestion of the County Attorney's own investigator
24 about how to do it with this witness. That is the truth.

25 THE COURT: Mr. Butner.

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1 MR. BUTNER: Judge, I don't see Mr. Englert⁶
2 mentioned anywhere in this motion, and I don't know what we
3 are doing standing up here litigating this in front of the
4 Court. It hasn't been raised by proper motion. If they want
5 to interview Mr. Englert, we will set up an interview of
6 Mr. Englert for them.

7 THE COURT: I don't think that is the issue
8 with regard to Mr. Englert. I don't know how we particularly
9 got off on that tangent, except as Mr. Sears raised it, as
10 example of one of the issues that may remain in the case
11 about who the State knows they are going to call versus
12 somebody that may be in a gray area of who you are going to
13 call versus an identification of what part of the case they
14 are going to be called in, the mitigation rebuttal as opposed
15 to primary case rebuttal. And to observe that 15(i) had
16 allegedly not been complied with in terms of identifying
17 rebuttal on the basis of which factor.

18 MR. BUTNER: Judge, the last time Mr. Sears
19 and I chatted in the courtroom upstairs, he asked me about
20 Mr. Englert. He asked me if Mr. Englert was still going to
21 be a witness. I said yes, he is going to be a witness. He
22 asked me about the interview situation and who was going to
23 be paying, and I thought that it would be appropriate that we
24 pay for our experts being interviewed and they pay for
25 their's. I indicated that I had to check with my boss to be

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1 able to do that.

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Democker 040710 partial.txt

2 I have done that. I can't. But I never
3 deviated, never have deviated from saying Mr. Englert will be
4 a witness in the State's case in chief, and was identified as
5 such all along.

6 (Whereupon, this portion of the proceedings were concluded.)

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